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State of Utah v. Ronald Alan Harry : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 920633-CA
v.	:	
RONALD ALAN HARRY,	:	Category #2
Defendant/Appellant,	:	

BRIEF OF THE APPELLEE

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AN APPEAL FROM A JURY VERDICT, JUDGMENT, AND CONVICTION ON FOUR COUNTS OF SECURITIES FRAUD ENTERED AGAINST THE DEFENDANT-APPELLANT BY THE HONORABLE RICHARD H. MOFFAT, THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.

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BRIEF OF THE APPELLEE

The State of Utah appears through counsel Jan Graham, Attorney General, and David N. Sonnenreich, Assistant Attorney General, and submits the following Brief of Appellee:

STATEMENT OF JURISDICTION

The Appellee agrees with the Appellant's statement of jurisdiction.

STATEMENT OF THE ISSUES AND THE STANDARDS OF REVIEW

ISSUE 1: Did the trial court abuse its broad discretion when it allowed expert testimony in a securities fraud case as to the materiality of certain misrepresentations and omissions?

STANDARD: "Whether a piece of evidence is admissible is a question of law, and [appellate courts] always review questions of law under a correctness standard," but when the rule of evidence "vests a measure of discretion in the trial court," the appellate court reverses only if it concludes that the trial court exercised its discretion unreasonably. State v. Ramirez, 817 P.2d 774, 481-82 n.3 (Utah 1991). With respect to expert testimony, the trial

court's determination will not be reversed on appeal "in the absence of a clear showing of abuse." Lamb v. Bangart, 525 P.2d 602, 607-608 (Utah 1974) (as cited in State v. Larsen, 828 P.2d 487, 492 (Utah App. 1992).

ISSUE 2: Was the defendant entitled to a jury instruction that specific intent to defraud is an element of securities fraud under Utah Code Ann. §§ 61-1-1(2) & (3) and 61-1-21?

STANDARD: This is an issue of statutory construction, and is reviewed for correctness. Grayson Roper Ltd. v. Finlinson, 782 P.2d 467, 470 (Utah 1989).

ISSUE 3: Was the defendant entitled to a jury instruction that his alleged subjective good faith constituted a complete defense to a prosecution for securities fraud under Utah Code Ann. § 61-1-1(2) & (3) and 61-1-21?

STANDARD: This is an issue of statutory construction, and is reviewed for correctness. Grayson Roper Ltd. v. Finlinson, 782 P.2d 467, 470 (Utah 1989).

ISSUE 4: Was the trial court's determination that the defendant did not receive ineffective assistance of counsel at trial clearly erroneous, and if so, is the defendant therefore entitled to a new trial?

STANDARD: This exact issue was recently reviewed in State v. Templin, 805 P.2d 182 (Utah 1990):

> "The Strickland Court held that ineffective assistance of counsel claims present a mixed question of fact and law. Therefore, in a situation where a trial court has previously heard a motion based on ineffective assistance of counsel, reviewing courts are free to make an independent determination of a trial court's

> conclusions. The factual findings of the trial court, however, shall not be set aside on appeal unless clearly erroneous."

805 P.2d at 186 (footnoted omitted).

ISSUE 5: Did the facts proven at trial with regard to Count 4 constitute a public offense?

STANDARD: This is a mixed question of fact and law because the defendant, in his brief, argues for a particular statutory construction, and then asserts that the facts at trial did not meet the elements of that construction. The question of statutory construction is reviewed for correctness. Grayson Roper Ltd. v. Finlinson, 782 P.2d 467, 470 (Utah 1989). The question of factual sufficiency requires that

> . . . we defer to the jury and evaluate the evidence in a light favorable to the verdict. We accept the evidentiary inferences that tend to support the verdict rather than the contrary inferences that support the appellants' version of the facts, even if we might have judged those inferences differently had we been deciding the matter in the first instance, and not as an appellate court. When the testimony of witnesses is in conflict, we accept that testimony which supports the jury's verdict, unless it is inherently implausible, and ignore the evidence which does not support the verdict, even if we might think it more convincing. For the appellants to overturn the jury verdict, therefore, they must set out in their briefs, with record references, all the evidence that supports the verdict, including all valid inferences to that effect, and demonstrate that reasonable people would not conclude that the evidence supports the verdict.

Hodges v. Gibson Products Co., 811 P.2d 151, 156 (Utah 1991).

ISSUE 6: Did the facts proven at trial with regard to Counts 2 and 3 constitute a public offense?

STANDARD: The standards for this issue are the same as the standards for Issue 5.

DETERMINATIVE STATUTE

Utah Code Ann. § 61-1-1 (1989):

> It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly to:
>
> (1) employ any device, scheme or artifice to defraud;
>
> (2) make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
>
> (3) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

STATEMENT OF THE CASE

This case is an appeal from a Third District Court jury verdict finding Ronald Alan Harry ("Harry"), the Defendant and Appellant, guilty of four counts of securities fraud in violation of Utah Code Ann. § 61-1-1 (1989). In summary, the State charged, and the jury found, that Harry had committed securities fraud with respect to sales of a real estate limited partnership that he made to three of his clients between May 6, 1988 and May 10, 1988,[1] and that he further defrauded his brokerage house by selling those securities without the brokerage house's permission in an attempt to avoid sharing the commission. After the trial, Harry vigorously challenged the verdict on the grounds set forth in this appeal, and lost. Judgment and conviction was entered by the Honorable Richard H. Moffat on September 25, 1992. The facts of the case, which follow, are set forth in the light most favorable to the verdict, as this Court is bound to "accept the evidentiary inferences that

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[1]Sorry, but these exact dates are important, as will be seen.

tend to support the verdict rather than contrary inferences that support the appellants' version of the facts, even if [this Court] might have judged those inferences differently had [it] been deciding the matter in the first instance, and not as an appellate court." Hodges v. Gibson Products Co., 811 P.2d 151, 156 (Utah 1991).

A. HARRY'S BACKGROUND

1. Harry had been a registered securities representative ("stockbroker"[2]) since 1975. R. at 1124. He worked at E.F. Hutton for eight years and at Prudential Bache for four years before he joined Private Ledger on January 11, 1988. R. at 716, 1125-1128. He took and passed numerous securities examinations, including the basic Series 7 examination, the Series 63 all states examination, and the Series 24 supervisor's examination. R. at 877, 1027 (for an explanation of the exams, see R. at 701-702). He took the supervisor's examination on April 18, 1988. R. at 904. In short, by April of 1988 Harry was a very experienced, well trained stockbroker, who knew what his clients and his brokerage house expected of him, and what the law demanded of him.

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[2]Although both sides' briefs refer to Harry as a "stockbroker" as a matter of convenience, the term is not technically accurate. Harry was a registered representative of Private Ledger, which is a licensed broker-dealer. Registered representatives are agents, as that term is defined in Utah Code Ann. § 61-1-13(2) (Supp. 1992). Notably, "[t]he license of an agent is not effective during any period when he is not associated with a particular broker-dealer licensed under this chapter or a particular issuer." Utah Code Ann. § 61-1-3(2)(a) (Supp. 1992). Thus Harry's legal right to act as an agent, and to conduct transactions such as the ones at issue in this case, was totally dependent upon the existence of a contractual relationship with Private Ledger or some other licensed broker-dealer.

B. SUMMARY OF THE RED RIVER DEAL

2. In February of 1988 Harry and several other Private Ledger brokers had a meeting with Ross Farnsworth, who was a general partner of a newly formed real estate limited partnership named Red River Mountain Limited Partnership ("Red River"). R. at 772, 774-775. Ross Farnsworth explained that Red River planed to purchase two plots of land for speculation in the Phoenix, Arizona area, and he gave the brokers a Pre-Offering Summary Memorandum (the "Pre-Offering Memorandum," admitted as Exhibit P-1).[3] R. at 775-780, 1093. According to Mr. Farnsworth, among other things, he specifically discussed the following aspects of the Red River deal:

A. Farnsworth discussed the payment schedule shown on page 13 of the Pre-Offering Memorandum, which shows that an investor (limited partner) would make an initial investment of $5,100 per unit, but could be liable for up to 13 additional annual payments of differing amounts, for a total investment of $39,975 per unit. R. at 776-777; Exhibit P-1, at 13. He testified that his discussion with Harry of the possibility of future payments was "the thing that was most important," and he went on to say "so we talked about annual payments, you know, obviously being an important part of the project." R. at 777.

B. Ross Farnsworth discussed his own track record, and he showed Harry page 18 of the Pre-Offering Memorandum, which

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[3]All of the State's Exhibits at trial (P-1 through P-21) are included as Addendum "A" to this brief.

shows that of 10 completed projects, five lasted for 12 months or more and required at least one additional annual payment. One project lasted for 27 months, and required at least two additional annual payments. R. at 776-778. Farnsworth was emphatic with respect to what he told Harry on this point:

> Q (Sonnenreich): Did you give any opinion as to the time frame that you used to sell these projects, specifically that you used to sell the project "Red River Mountain" to investors?
> A (Farnsworth): Yes, sir. We were. I was very clear that I sold all my limited partnerships hoping for three to five year goals.
> Q: Meaning?
> A: Meaning that -- they should figure that at least they should be involved -- the limited partners would be involved for three to five years.
> Q: Even though in fact your track record was better than that?
> A: Right. But we took into consideration because we were involved in a fairly strong market at that time; and we knew that that was more realistic.

R. at 778-779. In short, Harry new that there was a very real possibility that investors in Red River would have to make at least some additional payment beyond the original purchase price of $5,100 per unit.

C. Farnsworth also told Harry that he would receive a 10 percent commission on Red River.[4] R. at 780.

3. In March of 1988, Harry told Farnsworth, during a telephone conversation, that Red River was "a lot tougher" to sell

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[4]Harry did not retain any commission. Farnsworth sent him a check for a portion of the commission, which Harry returned because he "cannot accept the payment on a piecemeal basis." R. at 780-782; Exhibits P-13, P-14. Farnsworth later sent Harry another check, but voided it because of concern over Harry's relationship with Private Ledger. R. at 782-787.

than regular brokerage deals because Red River required annual payments. R. at 780.

4. Neither Ron Harry nor any member of Ron Harry's family ever personally purchased any units in Red River. R. at 793.

C. THE SELLING AWAY ISSUE

5. An important issue in the case was whether Harry was "selling away" from Private Ledger with respect to the Red River deal. The State's expert, Steven Nielsen,[5] offered this definition of the term:

> "Selling away" refers to the acts of an agent of a broker-dealer selling a security that is not being offered by the broker-dealer. It is also referred to as a private securities transaction. The broker-dealer has no knowledge of that transaction.
>
> . . .
>
> The problem is that an agent or a broker-dealer must supervise all agents' activities as they transact securities. If an agent sells away or effects a private securities transaction, the broker-dealer is unable to supervise and therefore the investors lose the protection that the supervision provides. Normally a broker-dealer will conduct due diligence; that is, he will take the time to review the offering to make sure that it's something they want to sell, to make sure that the offering is legitimate. And then they will monitor the activities of their agents as those agents sell those securities that the broker-dealer has approved.

R. at 894, 897-898. Selling away is a violation of the rules of the National Association of Securities Dealers (NASD), R. at 706-707, and is considered by experts to be illegal. R. at 895.

6. The Series 24 exam that Harry took on April 18, 1988, covered the concept of selling away. R. at 705. Private Ledger,

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[5]Mr. Nielsen is the assistant director of the Utah Division of Securities. He is an attorney and a certified public accountant. R. at 875.

in compliance with NASD rules, had an explicit policy against selling away. On December 5, 1987, Ron Harry signed a memorandum that states that selling away, without Private Ledger's prior *written* approval, is prohibited by NASD rules and Private Ledger policy. R. at 714, 716; Exhibit P-17. On April 18, 1988, Private Ledger mailed a copy of its procedures manual to Harry; he signed a receipt stating that he had received and read the manual on May 3, 1988; Private Ledger received the receipt on May 10, 1988, and entered it in their records the following day. R. at 715-717; Exhibit P-18. The procedures manual contains numerous prohibitions against selling away. R. at 717-720; Exhibit P-19. Clearly, Ron Harry knew that he should not be selling away, and that he needed written permission to sell any non-Private Ledger sponsored investment.

7. The undisputed evidence is that Harry was selling away from Private Ledger in the Red River deal. Even Harry does not say that he received written permission from Private Ledger; all he claims is that his Salt Lake City branch manager, Craig Cannon (who was a general partner in Red River, along with Farnsworth) told him that a person at Private Ledger had given oral permission. R. at 1156. Harry's witness, Craig Cannon, acknowledged (on cross-examination) that he never received any authorization from Private Ledger to sell Red River, that he never told Private Ledger about Red River, that he had never cleared the issue of Red River commissions with Private Ledger, and that he never told Harry that

he had received written permission to sell Private Ledger.[6] R. at 1090-1092.

8. Harry took pains to conceal from Private Ledger the fact that he was selling away Red River. A compliance questionnaire for Ron Harry, submitted to Private Ledger on October 17, 1988, five months after the sales at issue in this case, shows the answer "no" to two questions asking if Harry had sold away investments, or received a commission on sold away investments.[7] Further, Harry submitted weekly sales reports to Private Ledger, which were

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[6]Cannon did say that he lied to Harry and told Harry he had orally received permission from a person at Private Ledger (who was not actually authorized to give permission). R. at 1091; *cf.* R. at 736-741, 1099. This court should infer that the jury decided Cannon was lying on that last point. Cannon was Harry's friend and business associate, and he had an incentive to lie for Harry. Cannon had recently pled guilty to two counts of felony securities fraud in connection with a related investment (another real estate limited partnership that was sold away from Private Ledger). R. at 1089. Unlike the points Cannon admitted on cross-examination, Cannon knew that there was no way for the State to categorically disprove this statement.

Another defense witness, Val Butcher, testified very similarly to Cannon, stating that Cannon told him that Red River had been orally approved by Private Ledger. R. at 1112-1113. Butcher was another registered representative who sold for Private Ledger, and he was a long time friend of Harry's. R. at 1112. He suffers from the same credibility problems as Cannon with respect to the issue of oral approval.

In any event, even if Cannon were believed, Harry knew that unless he received *written* authorization from Private Ledger, he was selling away.

[7]Harry admitted that he filled out most of the form, but he claimed that someone else filled in the two critical "no" answers and signed his name to the form without his authorization. R. at 1033-1040. It does seem odd that Harry would leave a form mostly filled out, except for the signature and the two critical questions, so that some nefarious third party could fill out the remainder of the form fraudulently. The jury reasonably could have believed either (a) that Harry filled out the whole form, or (b) that he asked someone else to fill out the two questions, and to sign the form, so that he could later deny having done so.

supposed to list all investments he sold that week, including private securities transactions that had been approved by Private Ledger. R. at 727-728. If Harry believed that Private Ledger had authorized Red River, then he would have reported his sales; as it was, he did not include Red River sales in his weekly reports. R. at 729.

9. Donna Nauss, Private Ledger's compliance officer, testified about the harm caused by selling away. In summary:

A. Private Ledger lost the potential of its share of commissions on Red River[8];

B. Private Ledger was exposed to the risk of a lawsuit by a disgruntled investor (R. at 724); and

C. Private Ledger's reputation could be hurt if clients invest in a bad investment that they think Private Ledger had investigated and recommended (R. at 725).

D. HOW HARRY SOLD RED RIVER TO THREE CLIENTS

10. Three of Ron Harry's longstanding clients, in the spring of 1988, were Virl Thornton, Frank Brgoch, and Seymour Isaacs. R.

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[8]Actually, the way it would have worked if Red River had been a transaction approved by Private Ledger is that Private Ledger would have received the commission, and Harry would have received his share. Ms. Nauss stated, in response to a hypothetical question that matched the facts of the case, that for every $5,100 Red River unit, Harry would have received approximately $390, and Private Ledger would have retained approximately $120. R. at 707-709, 717-718, 742-743; Exhibit P-16, Schedule A(D). This means that Private Ledger lost the potential for some $1,800 ($120 X 15 units) worth of commissions from Red River. Of course, once Red River was sold away, Private Ledger no longer wanted any part of the commission because of potential liability concerns. R. at 743-744.

at 633, 823A-824, 913-914 . Ron Harry sold units in Red River to each of those clients.

11. Virl Thornton testified, *inter alia*, as follows:

A. He had known Ron Harry and his family for a long period of time. R. at 632-633.

B. He talked to Harry about Red River on April 29, 1988, before he purchased three units. R. at 640-641. Exhibit P-2. The purchase was consummated when a certificate was issued on May 6, 1988. Exhibit P-10.

C. Harry lied and said that both he and his father had invested in Red River. That lie was "primarily what sold" Thornton on Red River. R. at 641-642, 644, 656.

E. Harry did not mention the possibility of future payments beyond the original $5,100 per unit. If Harry had mentioned the possibility of future payments on Red River, Thornton "would not have touched it with a ten-foot pole." R. at 648.

F. Harry did not tell Thornton that he was selling Red River without involvement or authorization from Private Ledger. If Thornton had known that Private Ledger had never reviewed or approved Red River, he would not have bought it. R. at 644.

12. Frank Brgoch testified, *inter alia*, as follows:

A. Frank Brgoch and Seymour Isaacs are retired airline pilots and old friends who knew each other since 1950. R. at 823.

B. Brgoch had used Harry as his stockbroker since the mid-1970s. R. at 823A. It was important to Brgoch that Harry was affiliated with a reputable brokerage house such as Private Ledger. R. at 825.

C. Prior to Red River, Brgoch had been involved in several limited partnerships that "didn't turn out too well." R. at 826.

D. Brgoch gave Harry limited discretionary trading authority.[9] From the time Brgoch received his retirement fund in 1985, through 1988, Brgoch and Harry had discussions about the limit of Harry's authority with respect to the retirement fund. Brgoch and Harry agreed to these limits:

(1) Investments were to be bonds with practically no risk;

(2) Investments were to be liquid, with no long term investments;

(3) "And positively, no limited partnerships." R. at 826-830.

E. Brgoch met regularly with Harry to discuss his investment accounts; sometimes Isaacs was also present. *See, e.g.*, R. at 825, 827, 830, 834, 839, 867.

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[9]Discretionary trading authority means that the stockbroker can make trades on behalf of the client without first obtaining the client's approval as to the specific transaction. Discretionary trading authority can be unlimited (i.e. "do whatever you think is best for me"), or limited by specific restrictions (i.e. "don't invest more than $5,000 without my prior approval" or, in this case "don't invest in limited partnerships that require future payments.")

F. In May of 1988, Harry bought six units of Red River on Brgoch's behalf, using Brgoch's retirement funds. R. at 832-833, 840. Brgoch's funds were transferred to Red River on May 9, 1988. Exhibit P-7.

G. Shortly thereafter,[10] Brgoch stopped by Harry's office to check on his accounts. R. at 830. He had a conversation with Harry in which Harry said that he had invested some of Brgoch's money "in real estate" and that it was "looking good." *Id.* Because of the agreement limiting Harry's discretion, Brgoch understood this to be an investment in a real estate development bond, similar to other investments that Harry had made. R. at 830-832. Harry did not say anything to indicate that this was not a bond, or was a real estate limited partnership with future payments. R. at 832.

H. Brgoch confronted Harry after he received a June 30, 1988, bank statement showing funds from a retirement IRA account had been used to purchase "Red River Mountain Limited Partnership":

> A (Brgoch): He told me that that was the money that he got into with his partnership. I said what partnership? He said, the one that I told you about the other day, that real estate that we put in Arizona. I said, you didn't tell me anything about being in a partnership.

R. at 834; Exhibit P-7.

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[10]Brgoch obtained a bank statement dated 6/30/88 "a couple of months" after he talked to Harry. Therefore, his conversation with Harry must have been shortly after the May 9th purchase date, or even perhaps before Red River had closed. R. at 832; Exhibit P-7.

I. Brgoch stated that Red River "certainly does not" fit within the investment criterion that restricted Harry's discretion because Red River is a long term limited partnership. R. at 840.

13. Seymour Isaacs testified, *inter alia*, as follows:

A. Frank Brgoch and Seymour Isaacs are retired airline pilots and old friends who knew each other since 1950. R. at 912.

B. Isaacs had used Harry as his stockbroker since 1977 or 1978. R. at 913. It was important to Isaacs that Harry was affiliated with a reputable brokerage house such as Private Ledger. R. at 914.

C. Prior to Red River, Isaacs had been involved in several limited partnerships that Harry promoted, but "the few that we got into weren't being resolved as he recommended." R. at 916. Instead, those partnerships went on much longer than Harry said they would. R. at 916-918. As a result, and considering Isaacs' age, in 1987 and 1988 he told Harry "I wasn't interested in anything like that anymore. I might not live to enjoy the benefits of it." R. at 918.

D. Isaacs gave Harry limited discretionary trading authority. In 1987 and 1988, Isaacs and Harry had discussions about the limit of Harry's authority with respect to Isaacs' investments. Isaacs and Harry agreed to these limits:

(1) Investments were to be conservative, with practically no risk;

(2) Isaacs "didn't want any part of" any investments with multiple payments; and

(3) Harry was not to invest in limited partnerships.

R. at 918-920, 1019.

E. Isaacs met regularly with Harry to discuss his investment accounts. *See, e.g.*, R. at 867, 923, 926, 928, 1012, 1019.

F. In May of 1988, Harry bought six units of Red River on Isaac's behalf, using Isaac's retirement funds. R. at 914-915, 922, 923, 929; Exhibit P-4. Isaac's funds were transferred to Red River on May 9, 1988. Exhibit P-4.

G. Isaacs received a June 30, 1988 statement from a bank in Kansas, showing funds from a retirement IRA account had been used to purchase "Red River Mountain Limited Partnership". He confronted Harry about the transaction:

> A (Isaacs): Well, he said that I had invested in the Red River Mountain Land Promotion of some sort.
>
> Q (Sonnenreich): How did he describe it, as best you can remember, in that meeting?
>
> A: His description of it was that--his term was this was a one-time drop, single investment and that this land--the company who was handling this thing rarely had an investment go beyond two years, there would be no further moneys involved in it.

R. at 923; Exhibit P-4. Clearly, at this meeting Harry did not identify the investment as a limited partnership with an obligation for multiple payments.

SUMMARY OF THE ARGUMENTS

The Brief of the Appellant asserts six arguments in favor of relief:

I. the court erred in allowing Donna Nauss and Steve Nielsen to testify as to materiality;

II. the court erred in failing to instruct the jury that a specific intent to defraud is an element of securities fraud;

III. the court erred in failing to instruct the jury that the defendant's subjective good faith is a complete defense to a charge of securities fraud;

IV. the defendant received ineffective assistance of counsel from his trial counsel;

V. the facts proved with respect to Count 4 do not constitute securities fraud; and

VI. the facts proved with respect to Counts 2 and 3 do not constitute securities fraud because the alleged misrepresentations and omissions are not in connection with the sale of securities.

The State's short answer to these six points is:

1. the very recent case of State v. Larsen, 828 P.2d 487 (Utah App. 1992), has resolved issues I and II explicitly in favor of the State, and by implication has resolved issue III in favor of the State;

2. the alleged acts of ineffective assistance on the part of the defendant's trial counsel were rational tactical

decisions that were not clearly harmful to the defendant; and

3. Counts II, III, and IV were properly pled, constitute securities fraud, and were proved with sufficiency at trial.

ARGUMENT OF THE APPELLEE

I. THE STATE WAS PROPERLY ALLOWED TO ELICIT EXPERT TESTIMONY ON THE ISSUE OF MATERIALITY.

The exact issue raised in point I of the defendant's brief, whether an expert can testify as to materiality in a criminal securities fraud case, was recently resolved by this Court in State v. Larsen, 828 P.2d 487 (Utah App. 1992).[11] This Court held that "[s]ince the State is required to prove all of the essential elements of a crime, and materiality is an element of the offense charged in this case, there was no abuse of discretion in allowing the expert testimony." 828 P.2d at 493. Thus, the testimony of

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[11]The defendant's brief spends a great deal of time trying to convince this court that it wrongly decided the Larsen case, which is dispositive of the defendant's first three points on this appeal. Because the Larsen case is barely a year old, because it is directly on point, and because the law has not changed since it was issued, the State views Larsen as definitive and sees no reason to extensively rebrief the case in the body of this brief. Furthermore, Larsen itself is currently before the Utah Supreme Court on writ of certiorari. The issues addressed in Larsen will therefore be definitively decided by a higher court, regardless of the outcome of this case at this level of appeal. (Presumably, if the Utah Supreme Court still has Larsen under advisement, and if the outcome in this case rests solely on one of the issues decided in Larsen, the losing party will seek a writ of certiorari to obtain the possible benefit of a reversal based upon the outcome of the Utah Supreme Court's decision in Larsen.) A copy of the State's brief before the Utah Supreme Court is attached hereto as Addendum B, and is incorporated herein by reference, in the event that the court wishes to review the reasoning underlying the State's position on the issues decided in Larsen.

both Steve Nielsen[12] and Donna Nauss[13] on the issue of materiality was proper.

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[12]Although expert testimony on materiality is admissible under Larsen, the Court may have some concern over Mr. Nielsen's express statement that "selling away" is illegal under Utah securities law. A close examination shows, however, that (contrary to the assertion in the defendant's brief, page 14) Mr. Nielsen did not thereby render an expert opinion that Mr. Harry was guilty. Indeed, Mr. Nielsen did not opine that Mr. Harry had actually "sold away," and Mr. Harry was not charged with a crime of "selling away" from Private Ledger. Instead, the issue was whether Mr. Harry's undisputed failure to tell Thornton, Isaacs, Brgoch, and Private Ledger that he was "selling away" constituted an omission of a material fact.

Mr. Harry's trial counsel, Jim Barber, had previously repeatedly attempted to assert that "selling away" was merely a contractual issue between Mr. Harry and Private Ledger, see, e.g., R. at 752-755, and hence Mr. Harry's failure to disclose the fact was not a willful omission of a material fact. Mr. Nielsen's testimony was aimed at rebutting that assertion by showing that failing to disclose that you are "selling away" is material and that Mr. Harry would have a motive (the fact that the practice is illegal) for willfully concealing it from his clients. After expressing his opinion that "selling away" was illegal, Mr. Nielsen went on to explain the risks caused by the practice in some detail. R. at 897-898.

Although Mr. Barber moved for a mistrial, asserting that Mr. Nielsen's opinion that selling away is illegal was effectively an opinion that Mr. Harry was guilty of a crime with which he had not been charged, Judge Moffat, who had observed the whole course of the trial, understood the context of the question, and stated that "I couldn't see in any way whatsoever at this point that the question inferred the point that [Mr. Barber had] just made." R. at 896-897.

[13]Actually, Nauss' testimony was less expert testimony about materiality than it was a statement of what was material to Private Ledger. Since Private Ledger was a victim, its compliance officer could certainly testify as to what it expected of its stockbrokers and what types of omissions were material to it. In this respect, Nauss' testimony is no different than the testimony of Thornton, Isaacs, and Brgoch as to what they expected Harry to do, and what types of omissions were material to them.

II. SPECIFIC INTENT TO DEFRAUD IS NOT AN ELEMENT OF A SECURITIES FRAUD CASE.

Another holding in the Larsen case was that "willfulness" and not "specific intent to defraud" is the required mental state in a criminal securities fraud prosecution under Utah Code Ann. §§ 61-1-1 and 61-1-21 (1989). "The trial court, therefore, properly instructed the jury that the culpable mental state for the crime of securities fraud is 'willfulness,' rather than specific intent as proposed by Larsen." 828 P.2d at 495. This Court then went on to specifically approve a jury instruction on "willfulness" that is nearly identical to the one used in the case at bar.[14]

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[14]The jury instruction approved in Larsen reads:

> You are instructed that a person engages in conduct intentionally or with intent or willfully, with respect to the nature of his conduct or to the result of his conduct, when it is his conscious desire to engage in the conduct or cause the result.

828 P.2d at 495.

By way of comparison, the first sentence of Jury Instruction # 12 in the case at bar reads:

> You are instructed that a person engages in conduct willfully, with respect to the nature of his conduct or to the result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

R. at 250.

The only difference between the two instructions is that the one used in this case left out the phrase "intentionally or with intent or." That phrase adds nothing, as "intentionally" and "with intent" are synonyms for "willfully" under Utah law. *See*, Utah Code Ann. § 76-2-103(1) (1990).

III. THE COURT WAS CORRECT IN NOT GIVING AN INSTRUCTION THAT THE DEFENDANT'S SUBJECTIVE GOOD FAITH IS A COMPLETE DEFENSE TO A SECURITIES FRAUD CASE.

A. GOOD FAITH IS NOT A DEFENSE TO A SECURITIES FRAUD CASE.

The Larsen case did not directly address the question of whether a defendant is entitled to a jury instruction to the effect that "good faith" is a complete defense to a securities fraud case. Even so, the Larsen case effectively resolves the issue in favor of the State by implication. *See*, Brief of Appellant at 29.

The good faith defense is merely the flip side of the specific intent coin, as Mr. Harry concedes. *Id.* If the prosecution must prove that the defendant acted with a specific intent to defraud the victim, then the defendant can defend by claiming that he acted with subjective good faith, and not with an intent to defraud the victim. Hence the defendant would be entitled to a jury instruction to the effect that his good faith is a complete defense because such good faith would necessarily defeat an element of the State's case, namely the existence of a specific intent to defraud the victim. If, on the other hand, specific intent to defraud is not an element of the crime, then there is no basis for a "good faith defense" jury instruction.

In Larsen the Court of Appeals ruled that the State does not have to show a specific intent to defraud the victim. All that the state must show is that the defendant acted willfully, that it was his conscious desire to engage in the conduct or cause the result.

The good faith motivation of the defendant is irrelevant.

The conduct at issue in this case is found in section 61-1-1, which makes it illegal for the defendant, "in connection with the offer, sale, or purchase of any security, directly or indirectly to:

> (1) employ any device, scheme or artifice to defraud;
> (2) make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
> (3) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."

Utah Code Ann. § 61-1-1 (1989). It is possible to consciously engage in a misrepresentation, and to thereby violate subsection (2) of the statute, without intending that the recipient of the misrepresentation actually be "defrauded," at least in the sense of losing money. For example, a defendant could misrepresent facts to an investor in an effort to overcome the investor's unwillingness to invest in an opportunity that the defendant honestly thinks is in the investor's best interest, yet that defendant has clearly violated the statute on its face. Likewise, the language of subsection (3) expressly contemplates a case where the intent of the act, practice, or course of business may not be to defraud, but the effect is to "operate" as a fraud.[15] Under subsection (3), if a defendant has the conscious desire to engage in an act, practice, or course of business, and if that action "operates or would

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[15]If subsection (3) were to be read as requiring a specific intent to defraud, it would become mere surplus verbiage, since the act, practice, or course of business would then by definition be limited to devices, schemes, and artifices to defraud, which are already prohibited by subsection (1).

operate as a fraud or deceit," then the defendant is guilty regardless of whether he had a specific intent to defraud. Thus, good faith is no defense to a subsection (2) or subsection (3) claim, and no good faith jury instruction need be given with respect to either subsection.[16]

B. IF GOOD FAITH WERE A DEFENSE, THE DEFENDANT STILL WOULD NOT BE ENTITLED TO AN INSTRUCTION UNDER THE FACTS OF THIS CASE.

Harry's factual grounds for a good faith jury instruction are "that he had a good faith belief that there would be no future payments in the Red River Limited Partnership." Brief of Appellant at 32. Presumably, Harry therefore felt no need to emphasize the possibility of future payments to Thornton, Isaacs, or Brgoch. On the other hand, the defendant never asserted that he did not receive information about the possibility of future payments (such as that contained on page 13 of the Pre-Offering Summary), or even that he did not know that some of Farnsworth's projects went over one year (as shown by page 18 of the Pre-Offering Summary).

That is not a good faith defense. Instead, it is at best an argument as to the materiality of the omission, a claim that if the investor had all of the information the defendant had, including

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[16]Actually, in light of Larsen, the State would submit that no good faith instruction need be given with respect to subsection (1) either, since specific intent to defraud is now clearly not an element under that section either. However, in this case Harry received an instruction on specific intent as it relates to the theory that he violated subsection (1) by engaging in a device, scheme, or artifice to defraud. R. at 264, Jury Instruction 26. Because specific intent is th flip side of good faith, this instruction is effectively t equivalent of a good faith instruction. If the instruction was unnecessary under Larsen, it could only have aided the defense, and hence was harmless error.

all of Ross Farnsworth's rosy projections, then the possibility of future payments would appear so remote as to be immaterial.[17] Even if a good faith defense could still be raised after Larsen, jury instructions for such a defense would be inappropriate based upon the facts in this case.

IV. THERE IS NO BASIS FOR A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN THIS CASE.

Harry claims that the performance of his trial counsel, Jim Barber, was so defective that it denied the defendant the effective assistance of counsel. This claim is based on the following alleged errors:

1. A failure to make an opening statement;

2. A failure to introduce the Red River Mountain Limited Partnership Subscription Booklet (including a subscription agreement and suitability questionnaire);

3. A failure to demonstrate the suitability of the Red River Mountain Limited Partnership for Virl Thornton, Seymour Isaacs, and Frank Brgoch; and

4. A failure to prevent certain testimony by Donna Nauss.

The basic test for ineffective assistance of counsel claims is the two part test of Strickland v. Washington, 466 U.S. 668 (1984).

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[17]At worst, it is an arrogant assertion that the defendant was somehow entitled to substitute his judgment for that of his clients', even to the extent of deliberately hiding the truth from them. The law clearly prohibits an agent from saying "I know better than you, and I may therefore freely lie to you if I feel that doing so will protect you."

That test puts the burden on the defendant to show "that counsel's representations fell below an objective standard of reasonableness," 466 U.S. at 687-688, and that "but for counsel's unprofessional errors, the result of the proceedings would have been different." 466 U.S. at 694. That standard has been refined at length by the Utah appellate courts. This Court set forth a detailed set of criterion for evaluating an ineffective assistance of counsel claim in State v. Wight:

> In order to prevail on a claim of ineffective assistance of counsel, defendant must overcome the strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment. Defendant must prove not only that counsel's representations fell below an objective standard of reasonableness, but also that counsel's performance prejudiced defendant. This Court will not second-guess a trial attorney's legitimate use of judgment as to trial tactics or strategy.

765 P.2d 12, 15 (Utah App. 1988). Clearly, there is a "wide range of professional and competent assistance," State v. Frame, 723 P.2d 401, 405 (Utah 1986), and not even plain error constitutes ineffective assistance, unless there is "a reasonable likelihood that the verdict would have been different" but for the error. Jennings v. Stoker, 652 P.2d 912, 914 (Utah 1982). The burden of proof is on the defendant with respect to all elements of an ineffectiveness claim, and "[t]he proof must be demonstrable, not speculative." State v. Malmrose, 649 P.2d 56, 58 (1982). With these principles in mind, the State shall address the specifics of the defendant's claim.

A. THIS COURT SHOULD GIVE GREAT DEFERENCE TO THE TRIAL COURT'S FINDING THAT COUNSEL WAS COMPETENT.

The standard for review on this issue was recently explained

in State v. Templin, 805 P.2d 182 (Utah 1990):

> "The Strickland Court held that ineffective assistance of counsel claims present a mixed question of fact and law. Therefore, in a situation where a trial court has previously heard a motion based on ineffective assistance of counsel, reviewing courts are free to make an independent determination of a trial court's conclusions. The factual findings of the trial court, however, shall not be set aside on appeal unless clearly erroneous."

805 P.2d at 186 (footnotes omitted). In this case, there was a lengthy post-trial hearing on the defendant's motion for a new trial. Much of that hearing centered on the ineffective assistance of counsel claim. After taking a great deal of testimony, and reviewing numerous briefs, Judge Moffat made the following minute entry with respect to the ineffective assistance of counsel issue:

> Point four is a claim by the defendant that his trial counsel was ineffective in assisting him. This claim raises a great deal of concern on the part of the Court because it has become fashionable as a defense tactic to throw the original trial counsel in criminal cases to the wolves on the platter of ineffective assistance of Counsel giving little or no credence to the circumstances of the trial. The trial court supervised the proceedings in this case and is of the opinion that there was no ineffective assistance of counsel. The Court does not believe that trial counsel's performance fell below an objective standard of reasonableness. The Court certainly does not feel that the failure to make an opening statement in any way reduces effectiveness of counsel. That is often done and in the facts before the court in this case is [sic] impossible to determine that failure to make an opening statement would have altered the outcome of the case in any way whatsoever. The question of introduction of the subscription booklet to the Red River Mountain Project appears to the Court to be much more a tactical decision than it does to be ineffective assistance of counsel. There is certainly no evidence here that would tend to show that introducing the booklet would have altered the outcome of this case. As a matter of fact there was no way of knowing what the testimony might have been by Mr. Thornton if the document had not been used but there is some substantial reason to believe that his testimony could have been damaging to

the defense.

R. at 485-486. As more fully explained below, Judge Moffat's findings are anything but clearly erroneous. They should be upheld on appeal.

B. A FAILURE TO MAKE AN OPENING STATEMENT IS NOT INEFFECTIVE ASSISTANCE OF COUNSEL.

After the State made its opening, but before the beginning of the State's evidence, Mr. Barber expressly reserved his right to give an opening statement until after the close of the State's case. R. at 627. The decision not to give an opening statement before the State put on its evidence was obviously a conscious tactical decision made by Mr. Barber, and therefore *per se* not ineffective assistance. That decision has not been challenged by Harry.

When the prosecution had rested, Mr. Barber did not make an opening statement. Instead, he argued at length that certain counts should be dismissed,[18] R. at 1039-1064, and then he proceeded to call his first witness. Harry challenges this omission of an opening statement, which the defendant's brief characterizes as forgetfulness on Mr. Barber's part.

The decision not to give an opening statement before the defense put on its evidence was not an act of forgetfulness, but rather it was a tactical decision, if a subconscious one. Mr. Barber testified to this point at length during the April 10, 1992

[18]The motions were taken under advisement, and later denied.

portion of Harry's post-trial motion hearing.[19] At the time that he chose to not give an opening statement prior to the State's case, he states that:

> I thought my general impression there was that if I felt at the end of the State's case that an opening statement was appropriate and helpful, I would give one. But I still had the right not to give one and therefore I had not made any electable determination one way or the other.

Addendum C at 37. Barber's opinion of the situation when the State actually rested is shown by this exchange:

> Q (Sonnenreich): Okay. First of all, what was your opinion with respect to the length of the trial at that time?
> A (Barber): It was dragging unmercifully.
> Q: And did you have an opinion as to the effect of that upon the jury?
> A: Yes.
> Q: What was your opinion?
> A: Though I did not have the sense that the jury was angry that it was dragging, I thought the jury might be prone to reward those who would get on with it.
> Q: Did you have an opinion at that time as to whether you had been able to communicate the theory of your case to the jury through cross examination?
> A: Yes.
> Q: What was your opinion at that time?
> A: I believed that the jury understood the issues.

Addendum C at 42. Although Barber may have told Mr. Bugden the he "forgot" to make an opening statement, Addendum C at 38, he explained at length that he did not mean "I had made a decision to

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[19]For some reason, only the transcript for the March 18, 1992 portion of that hearing was included in the Record, at 947-998 (through an error, it was inserted into the middle of the trial transcript). The transcript for the April 10, 1992 portion is just as much a part of the Record under Utah Rule of Appellate Procedure 11. A copy of the missing transcript has been attached as Addendum "C." The quotes taken from this transcript are those that support the trial judge's finding of no ineffective assistance of counsel, in keeping with Templin.

make [an opening] statement and then forgot that I had made the decision to do it." Addendum C at 49. Instead, the decision to not make an opening statement was a subconscious one, based upon the situation of the trial at that time:

> . . . What I am saying is that I was satisfied to proceed without making the opening statement and whatever circumstances were then extinct [sic] that led me to be satisfied, appeared to have discouraged from the fact that I forgot to put the statement in, to spend any more time thinking about it or analyzing that prospect. I can't express it any more clearly than that.
>
> . . .
>
> In the sense that in light of all of those other circumstances that I have given you about eight times, I did not think about the process of not giving the statement. I am not going to say it is forgetting, though, because I think it implies more than I mean to say, and that is, that there was a reason to remember. You understand what I am saying?

Addendum C at 51, 53. Subsequently, the following exchanges took place:

> Q (Bugden): And are you suggesting today, Mr. Barber, that just somehow subconsciously these other things you told Mr. Sonnenreich about, that is, that the trail was running on, that you thought that the jury were bored, that you thought you were losing the jury, you think that just subconsciously helped you make the decision?
> A (Barber): Of course.
> Q (Bugden): Oh, I see.
> A (Barber): That is how you make decisions in trial.
>
> . . .
>
> Q (Sonnenreich): Do you make many decisions just subconsciously as a matter of reflex?
> A (Barber): If you want to call that making a decision, yes. What you do is act on the basis of the circumstances as you then perceive them.

Addendum C at 54, 56. It should be noted that Mr. Barber has tried more than one hundred cases. Addendum C at 55. Thus Barber made a subconscious decision, based upon years of trial experience and

his perception of the current status of this trial, that he would not make an opening statement. Given the situation as it existed when the State rested its case, namely that Barber had made his point through cross examination, was only going to call three witnesses in defense, and felt that the jury was restless, this was a perfectly valid exercise of professional discretion.[20]

Even if the lack of an opening statement was mere oversight falling below a standard of professional reasonableness, the defendant has utterly failed to provide any demonstrable proof that giving an opening statement would have been likely to change the outcome of the trial, as Judge Moffat found. R. at 486. For example, Harry has failed to marshall the evidence and show why Barber's closing argument was inadequate to make up for any harm done by the lack of an opening statement. Likewise, Harry has failed to explain why this case was so complex that a jury could not understand Harry's defense from the evidence at trial.[21]

Typically, a failure to make an opening statement has been

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[20]Even Harry's own expert witness on this point, Ed Brass, conceded that there were times when he might choose not to make an opening statement, and that other trial lawyers might choose to not make opening statements in other situations. Addendum * at 8.

[21]Just calling this a complex securities case is not enough. There are some securities cases that involve convoluted financial transactions, boxes full of exhibits, and months of highly technical testimony. In this case, by contrast, Harry's defense can be summarized as follows: "Ross Farnsworth told me that Red River would close within a year, so I didn't think the possibility of future payments was relevant. Craig Cannon told me that Private Ledger had approved my sales of Red River, so I didn't worry about that. I never intentionally lied to anyone, and I didn't even care about the commission. I just thought this was a good investment for my clients." That defense is not difficult to understand.

held not to constitute ineffective assistance of counsel. *See, e.g.*, United States v. Miller, 907 F.2d 994 (10th Cir. 1990); United States v. Mealy, 851 F.2d 890 (7th Cir. 1988); Gilliard v. Scroggy, 847 F.2d 1141 (5th Cir. 1988); United States v. Lane, 834 F.2d 645 (834 F.2d 645 (7th Cir. 1987); Fink v. Lockhart, 823 F.2d 204 (8th Cir. 1987); and Messer v. Kemp, 760 F.2d 1080 (11th Cir. 1985).[22]

C. FAILURE TO INTRODUCE VIRL THORNTON'S SUBSCRIPTION BOOKLET IS NOT AN INEFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Barber did not introduce the Virl Thornton's Subscription Booklet, which includes both the Subscription Agreement and the Suitability Questionnaire,[23] while Virl Thornton was on the stand, but he did try (unsuccessfully) to introduce it when the defendant was on the stand. This smacks strongly of a tactical decision. The Subscription Booklet was introduced in the preliminary hearing in this case (as Preliminary Hearing Exhibit D-1), and Virl Thornton was questioned at length about it, both by counsel for the defendant[24] and by counsel for the State. The result of that

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[22]There are a few cases that postdate Strickland v. Washington, 466 U.S. 668 (1984), where a failure to make an opening statement was held, in connection with an almost total lack of any effort to make an adequate defense, to constitute incompetence of counsel. *See, e.g.*, Jemison v. Foltz, 672 F. Supp 1002 (E.D. Mich. 1987).

[23]The complete Subscription Booklet was introduced at the preliminary hearing as Defense Exhibit 1. Cf. R. at 489-524 with R. at 454-463 & 467-477.

[24]Mr. Harry was represented by Max Wheeler at the preliminary hearing. Mr. Wheeler terminated his representation of Mr. Harry prior to trial, Mr. Barber represented Harry at trial, and Mr. Bugden took up Harry's case after trial. The preliminary hearing was transcribed over a year before the trial began, and Mr. Barber had access to a copy of that transcript.

questioning can be summarized as follows:[25]

1. Harry called Virl Thornton to his office, and then presented the Subscription Booklet to Thornton approximately a week after Thornton gave Harry the check for his units in Red River Mountain;

2. Thornton was given no opportunity to review the Subscription Booklet and did not remove the Subscription Booklet from Harry's office;

3. Thornton merely signed and initialed those pages of the Subscription Booklet that were pointed out to him by Harry; and

4. Thornton never saw, and Harry never pointed out, those pages of the Subscription Booklet that discussed the possibility of future payments.

In short, if the exhibit had been introduced through Virl Thornton there is every reason to believe that it would have hurt the defense, as Judge Moffat found.[26] R. at 486. Far from showing that Thornton had been aware of the possibility of future payments, the exhibit, combined with the testimony that it would have elicited from Thornton, would have tended to support the State's contention that the defendant was doing everything possible to hide

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[25]*See*, Preliminary Hearing Transcript, at: page 38, line 15 through page 39, line 8; page 55, line 20 through page 56, line 12; page 58, line 17 through page 62, line 10. Those pages, along with a few transitional pages, are set forth in the Record at 527-540. A full copy of the Preliminary Hearing Transcript can be found in one of the envelopes marked "Exhibits," as part of the Record.

[26]In fact, the State seriously considered introducing the document as a State's exhibit. R. at 492-497.

the liability for future payments. Certainly, there is no reason to believe that the admission of this exhibit through Thornton would have altered the outcome of the trial.[27] (This is particularly true in light of Thornton's testimony that the most important inducement to his investing was Harry's misrepresentation that both he and his father had invested already, an assertion that is not at all affected by the Subscription Booklet.)

One final point concerning the Subscription Booklet: If the failure to introduce the Subscription Booklet through Thornton was mere oversight, then the defendant is also personally responsible for that oversight. Ron Harry clearly knew about the Subscription Booklet, had heard the testimony concerning it at the preliminary hearing, and knew that it pertained to Virl Thornton. Ron Harry, a particularly intelligent defendant, was also actively engaged in his own defense. Indeed, he regularly passed notes to Mr. Barber throughout the trial, and Mr. Barber almost always checked with Harry before leaving a witness. He certainly could have pointed out the deficiency at the end of Mr. Barber's cross exam or while State's counsel was conducting redirect. The Utah Supreme Court has recognized that a knowledgeable defendant has some obligation to request obvious assistance. *See*, Duran v. Turner, 516 P.2d 353,

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[27]The defense's only hope to make good use of the exhibit was to wait until Virl Thornton had left Utah, and then try to introduce the exhibit through the defendant himself, so that Mr. Thornton could not explain the circumstances surrounding his signature of some of the pages. That is precisely the strategy that the defense attempted. Naturally, the State objected, and the court correctly refused to allow the exhibit to come in through the defendant after Mr. Thornton had been excused.

354, 30 Utah 2d 249 (1973) (defendant familiar with Utah procedure had obligation to ask counsel to file an appeal).

D. THERE WAS NO INEFFECTIVE ASSISTANCE OF COUNSEL WITH REGARD TO ESTABLISHING THE SUITABILITY OF THE INVESTMENT.

The State has two responses to the defendant's claim that Mr. Barber took inadequate steps to establish the suitability of Virl Thornton, Seymour Isaacs, and Frank Brgoch.

First, as a matter of law, suitability[28] is not a defense to a securities fraud charge. If a defendant employs a scheme to defraud, makes misrepresentations or omission, or engages in a course of business which would operate as a fraud, it is no defense to argue that the investment is suitable for the defrauded victim. In particular, the plain language of Utah Code Ann. § 61-1-1 (1989) does not allow a defendant to say, in essence, "yes I misrepresented the facts, but the investment was actually suitable for the defendant, so I am not guilty of securities fraud." Even if an investment in Red River Mountain was objectively reasonable for Thornton, Isaacs, and Brgoch, that fact alone does not allow the defendant to force the investment upon those individuals through fraudulent means.

Second, as a matter of fact, Mr. Barber did establish evidence of suitability with regards to Thornton, Isaacs, and Brgoch. *See, e.g.*, R. at 675, 842-846, 930-931. Mr. Barber explained his decision not to explore suitability further as follows:

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[28]Stated simply, an investment is "suitable" for an investor if it objectively meets that investor's requirements with respect to risk, probable return, liquidity, and other factors.

> Q (Sonnenreich): Each of these exhibits, there is a list of suitability questions or issues or points, however you want to phrase them, one for Mr. Isaacs, one for Mr. Brgoch, and one for Mr. Thornton. Did you address suitability in your cross examination of the witnesses?
>
> A (Barber): Yes. Well, using it in the plural, to my recollection I addressed the issue of suitability with considerable detail with Mr. Thornton. And perhaps somewhat less detail with the other two.
>
> Q: There are also lists of limited partnership portfolios for each individual. You did not go in detail on each one of those limited partnerships with each individual, did you?
>
> A: No, I did not.
>
> Q: Why was that?
>
> A: Well, a number of reasons. One is that most of them are not real estate limited partnerships, and I doubted that but for a reference to them they are very likely admissible. But secondly, I was familiar with the direct testimony of each of these investors, at least Brgoch and Isaacs, that the two of them claimed to have expressly instructed Mr Harry not to put them in any more of those kinds of deals before the Red River Limited Partnership was presented to them. And I knew that both Mr. Brgoch and Mr. Isaacs were pretty much there to make a speech and that every time I raised the issue, they made their speech. And so I thought it was going to be damaging to go through the detail of those and that the return on that issue would not be very great.

Addendum C at 47-48; *See, e.g.*, R. at 844-846. At most, Harry may complain about the quantity of that evidence. There is absolutely no proof, however, that more evidence of suitability, essentially along the lines Mr. Barber explored, would have altered the outcome of the trial, particularly in light of its legal irrelevance.[29]

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[29]The only possible legitimate use of suitability evidence would be as a backhanded way of attempting to show materiality -- in essence an argument that the underlying transaction was so suitable that a reasonable investor would not have minded being lied to. That argument is extremely weak in light of explicit testimony from all three individuals to the effect that they clearly felt that investments with future payments were not suitable for them at this late juncture in their lives, and that the existence of an obligation to make future payments was material to them because of their circumstances.

E. THERE WAS NO INEFFECTIVE ASSISTANCE OF COUNSEL WITH RESPECT TO DONNA NAUSS' TESTIMONY

Harry argues that he did not receive effective assistance of counsel because Donna Nauss, the Private Ledger compliance officer, was allowed to opine that Harry's conduct violated internal Private Ledger policies, and exposed Private Ledger to the risk of lawsuits by disgruntled investors. He argues that Nauss' opinions were legally irrelevant, and were based upon improper evidence.

Ms. Nauss' opinion that Ron Harry was selling away in knowing contravention of Private Ledger rules was relevant because it showed Harry's state of mind. Putting knowledge in Harry's head that selling away was wrong is essential to showing that Harry *willfully* omitted to tell Private Ledger and his three investors that he was selling away, and it is strongly probative of the point that Harry knew his omission was *material*.

Ms. Nauss' opinion was based upon much more than just the procedures manual. It was also based upon her review of Harry's weekly sales reports, R. at 727-729, the memorandum Harry signed on December 5, 1987 that states that selling away is prohibited, Exhibit P-17, the Series 24 exam that Harry took only days before he made the first Red River sale, and many other sources. Furthermore, contrary to the bald assertion in the defendant's brief, the jury could reasonably have inferred that Harry read the procedures manual before the sales to Isaacs and Brgoch were

consummated.[30]

With respect to Ms. Nauss' statement that Harry's conduct in selling away could expose Private Ledger to lawsuits, that testimony was relevant and therefore properly admitted. The jury needed to know the ways in which selling away hurt Private Ledger in order to assess the materiality of Harry's omission. Exposure to legal liability is certainly a harm. Given the nearly strict liability nature of civil securities laws with respect to the broker-dealer's duty to supervise agents, this is a very real and palpable harm. *See, e.g.*, Arrington v. Merrill Lynch, Pierce, Fenner & Smith, 651 F.2d 615 (1981). The testimony was proper.

V. COUNT 4, CONCERNING PRIVATE LEDGER, WAS PROPERLY PLED AS A SECURITIES FRAUD COUNT.

Harry has claimed that Count 4 does not constitute a public offense because Harry did not commit fraud against Private Ledger "in connection with the offer, sale, or purchase of any security" as required by Utah Code Ann. § 61-1-1 (1989). He further claims that the State's theory of liability is so novel that it should not be allowed under State v. Burton, 800 P.2d 817 (Utah App. 1990).

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[30]This is why exact dates are important. The receipt for the procedures manual, Exhibit P-18, states in part that the recipient "has read and understood its contents." Harry's signature is dated "date received 5/3/88," and the receipt was received back by Private Ledger on May 10, 1988. The sale to Isaacs was consummated on May 10th, Exhibit P-4, and the sale to Brgoch on May 9th. Exhibit P-7. The jury could easily have believed that Harry read the manual before May 9th, considering that the returned receipt reached California on May 10th. Thus the timing on the manual is harmful to Harry; it shows that he was reading that selling away was prohibited at the very moment that he was consummating the Isaacs and Brgoch sales.

A. PRIVATE LEDGER WAS A DIRECT VICTIM OF HARRY'S FRAUD.

To reiterate the State's position in a nutshell, the evidence established the following:

1. Ron Harry was Private Ledger's agent, with fiduciary duties toward his employer, upon whom he depended for his legal ability to be a stockbroker;

2. At all material times Ron Harry knew that "selling away" without prior written authorization was a violation of his agreement with Private Ledger, and was contrary to the scheme of securities regulation generally;

3. Ron Harry repeatedly represented to Private Ledger, before, during, and after the Red River sales, that he would not sell away, that he was not selling away, and that he did not sell away;

4. Ron Harry knew that Private Ledger had not authorized selling away of Red River Mountain;

5. Ron Harry expected to receive a 10 percent commission from the sale of Red River Mountain units;

6. Ron Harry was in constant contact with the main office of Private Ledger, yet he deliberately hid his sales of Red River Mountain units from the main office when he submitted his weekly sales reports;

7. At least part of Ron Harry's motive in selling away Red River units to Thornton, Isaacs, and Brgoch was to conceal the sales from Private Ledger, thereby defrauding Private Ledger of its legitimate share of the commissions; and

8. Private Ledger suffered a number of collateral harms, such as a risk of damage to its reputation or of civil litigation with investors, as a result of Harry's fraud.

Thus, Private Ledger was a direct victim of Harry's fraudulent scheme to sell Red River to Thornton, Isaacs, and Brgoch. In essence, Private Ledger was a third party to each securities transaction because it had a right to receive commissions from every sale made by Harry. In a literal sense, there is a direct connection between the offer, sale or purchase of these securities and Harry's fraud against Private Ledger.

In particular, when Harry made a misleading offer of Red River to Thornton, while concealing the fact that he was selling away and planning to keep the commission for himself, he defrauded both Thornton and Private Ledger at the same time.

B. THE "IN CONNECTION WITH" REQUIREMENT ONLY MANDATES THAT THE FRAUD "TOUCH" A SECURITIES TRANSACTION.

The facts fit the statute exactly, even if they do not present the more typical situation of a defrauded investor. Federal courts have interpreted the nearly identical "in connection with" language under § 10(b) of the Securities Exchange Act of 1934[31] and

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[31] It shall be unlawful for any person, directly or indirectly, . . .
(b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device . . .
15 U.S.C. § 78j(b). While federal law is not controlling of state law, the Utah Uniform Securities Act "may be so construed as to . . . coordinate the interpretation and administration of this chapter with the related federal regulation." Utah Code Ann. § 61-1-27 (1989).

Securities and Exchange Commission Rule 10b-5[32] to require only that the fraud "touch" the sale:

> The Supreme Court has said that section 10(b) is to be read flexibly. When there is a sale of a security and fraud "touches" the sale, there is redress under section 10(b). Superintendent of Insurance v. Bankers Life and Casualty Co., 404 U.S. 6 (1971). It does not matter that the fraud is not of the "garden variety" associated with securities sales. *Id.*

Arrington, 651 F.2d 615, 619 (1981). *See also* Alley v. Miramon, 614 F.2d 1372, 1378 n.11 (5th Cir. 1980). The "in connection with" element prohibits claims based upon the extremely attenuated links between plaintiff's injury and defendant's conduct." In re Financial Corp. of America Shareholder Lit., 796 F.2d 1126, 1130 (9th Cir. 1986) (holding that an accounting firm is not liable to investors when it changed a client's accounting methods, thereby causing the company to report bigger losses). In this case there is no attenuation between Private Ledger's injuries and Harry's conduct; his conduct directly caused those injuries.

The Alabama Supreme Court, construing the anti-fraud

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[32] It shall be unlawful for any person, directly or indirectly, . . .
(1) to employ any device, scheme, or artifice to defraud,
(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
in connection with the purchase or sale of any security. 17 C.F.R. § 240.10B-5.

provisions of the Alabama Uniform Securities Act[33] in Buffo v. State, 415 So. 2d 1158, 1164-1165 (Ala. 1982), demonstrated how loose the "connection" between the fraud and the sale of securities can be. In Buffo, a criminal case, the defendant gave two fraudulent real estate appraisals on some California land. The land covered by the appraisals was to be sold to an insurance company in exchange for issuance of notes. The insurance company, however, was in serious financial difficulty. Without additional capital, the Alabama Insurance Commissioner indicated that he would declare the company insolvent. The appraisals were given to the Insurance Commissioner to persuade him not to take action against the company and to allow the company to issue notes to acquire additional capital. The court found that the issuance of the surplus notes was the sale of a security, and it held that the Alabama Insurance Commissioner had been defrauded by the false appraisals prepared by the defendant. The Alabama court stated that:

> When nexus is the issue to be determined, the essence of the question becomes whether the fraud has a sufficiently close relationship to the purchase of sale of the security to make it actionable. The cases make it apparent that the fraud does not have to be intrinsic to the specific securities transaction."

415 So. at 1164. The court concluded that the fraud on the Insurance Commissioner had the necessary nexus with the sale of notes to come within the anti-fraud provisions of the Alabama

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[33]Alabama's anti-fraud statute, Ala. Code § 8-6-17 (1975) is identical to Utah Code Ann. § 61-1-1 (1989). This Court should construe Utah law in a uniform way. Utah Code Ann. § 61-1-27 (1989).

Securities Act. Certainly, the securities transactions in this case "touch" Private Ledger more closely than the securities transactions in Buffo touched the Alabama Insurance Commissioner.

C. THIS CASE IS NOT A NOVEL CRIMINAL PROSECUTION OF A MERE CIVIL CONTRACT DISPUTE, LIKE THE CASE IN STATE V. BURTON.

The defendant argues that Count 4 is merely a civil contract dispute. Not so. By definition, securities fraud, and most other forms of commercial fraud, almost always involve contractual relationships. Count 4, however, focuses on the defendant's fraudulent behavior in connection with the sale of securities, and not on the defendant's possible breach of contract *per se*. Harry was convicted of defrauding Private Ledger by depriving it of potential commissions and exposing it to liability. Selling away, which violated Harry's contract with Private Ledger, was merely a device used by Harry to conduct the fraud. The fact that selling away violated Harry's contract with Private Ledger was relevant because it showed that Harry knew selling away was wrong, knew that concealment of selling away was a material omission, and had an additional motive for hiding the selling away from Private Ledger.

The case of State v. Burton, 800 P.2d 817 (Utah App. 1990), can be easily distinguished. In that case, this Court found that a failure by a home seller (Burton) to forward payments from a home buyer (Waldron) to the seller's creditor (Valley First Security, who had a lien on the home) was not simple theft under Utah Code Ann. § 76-6-404 (1990). Theft under that statute requires the unauthorized control over the property of another. In order to prevail, the State had to show that Burton was controlling

Waldron's money in an unauthorized manner. The Court expressly found that Burton was under no contractual obligation to forward Waldron's payments themselves, but had merely agreed to make payments to Valley First Security with any money Burton chose to use. Thus, Burton had a right to use Waldron's money any way he chose. In essence, the theft charges in Burton could only have been upheld if there had been an explicit contract regarding the application of Waldron's money to pay Valley First Security. If anything, Burton supports the State's position in the case at bar because Harry expressly violated his contract with Private Ledger that prohibited selling away and required that he share commissions.

Burton talks about the dangers of a "unique theory of criminal liability." Certainly, using a garden variety theft charge to criminalize a failure to make a payment on a contract is a unique theory of criminal liability. There is no public policy in favor of such a broad expansion of the concept of "theft."

Securities law, on the other hand, is designed to create an environment of trust and fair dealing in the offer, purchase, and sale of securities. That environment is essential to the sound functioning of our capital markets. It is not surprising that the Supreme Court has taken a very expansive view of the scope of federal anti-fraud provisions:

> "[We do not] think it sound to dismiss a complaint merely because the alleged scheme does not involve the type of fraud that 'is usually associated with the sale or purchase of securities.' We believe that §10(b) and Rule 10b-5 prohibit *all* fraudulent schemes in connection with the purchase or sale of securities, whether the

> artifices employed involve a garden type variety of fraud, or present a unique form of deception. Novel or atypical methods should not provide immunity from the securities laws."

Superintendent of Insurance, 404 U.S. at 11, n.7 (quoting, A. T. Brod & Co. v. Perlow, 375 F.2d 393, 397 (2nd Cir. 1967)). Furthermore, "Congress made clear that 'disregard of trust relationships by those whom the law should regard as fiduciaries, are all a single seamless web' along with manipulation, investor's ignorance, and the like." 404 U.S. at 11-12. If the securities laws are broad enough to encompass accounting firms (that neither bought nor sold securities) as defendants, Roberts v. Peat, Marwick, Mitchell & Co., 857 F.2d 646 (9th Cir. 1988), they are certainly broad enough to include a brokerage house as a victim where the stockbroker schemed to defraud the brokerage house as part of a securities transaction.

One final factor distinguishes this case from Burton. If the theft conviction in Burton had been allowed to stand, it would have criminalized all sorts of routine breaches of contract, behavior that is not normally thought of as criminal. In contrast, if Harry's behavior *vis a vis* Private Ledger had not been "in connection with" a securities transaction, it would clearly have been communications fraud, in violation of Utah Code Ann. § 76-10-1801 (1990):

> (1) Any person who has devised any scheme or artifice to defraud another or to obtain from another money, property, or anything of value by means of false or fraudulent pretenses, representations, promises, or material omissions, and who communicates directly or indirectly with any person by any means for the purpose of executing or concealing the scheme or artifice is

guilty of:

> (d) a second degree felony when the value of the property, money, or thing obtained or sought to be obtained is more than 10,000 but does not exceed 100,000 . . .

Thus, Harry's conduct is clearly criminal, and if anything he has benefited from being charged under the lesser penalties of the more specific securities fraud statute.[34]

VI. COUNTS 2 AND 3, CONCERNING SEYMOUR ISAACS AND FRANK BRGOCH, INVOLVE CONDUCT THAT IS "IN CONNECTION WITH" SECURITIES TRANSACTIONS.

Harry alleges that Counts 2 and 3, concerning Isaacs and Brgoch,[35] must fail because any fraud by Harry occurred after Harry had irrevocably committed those investors to Red River and therefore the fraud is not "in connection with" the securities transactions. The State's view is that there are three separate factual theories under which Harry's fraud predates the time that Isaacs and Brgoch became irrevocably committed to Red River, and that in any event the "in connection with" phrase should be read

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[34]Under communications fraud, Harry would have been subjected to a second degree felony charge because that statute aggregates the total amount that the defendant sought to obtain from all victims, whether the defendant intended to keep that money for himself or not. Utah Code Ann. § 76-10-1801(2) (1990). Thus, Harry sought to obtain at least the total initial investments of $76,500 from the three investors. Securities fraud, by contrast is always an undesignated felony with lower penalties, regardless of the size of the fraud. Utah Code Ann. § 61-1-21 (1989).

[35]Harry, in his brief, has treated the situations with Isaacs and Brgoch as being the same and has not made any attempt to differentiate the two counts. The State agrees that given the similarity of their testimony, their longtime mutual friendship which extended to meeting with Harry together on occasion, and the nature of the counts, no distinction should be made between Isaacs and Brgoch.

liberally enough to encompass some post-transaction frauds of a lulling nature.

A. A SCHEME OR ARTIFICE TO DEFRAUD, OR AN ACT, PRACTICE, OR COURSE OF BUSINESS THAT OPERATES AS A FRAUD, IS "IN CONNECTION WITH" THE PURCHASE OR SALE OF SECURITIES EVEN IF PARTS OF THE SCHEME ARE NOT CARRIED OUT UNTIL AFTER THE SECURITIES TRANSACTION IS COMPLETE.

The jury in this case was instructed on all three possibilities under Utah Code Ann. § 61-1-1 (1989), namely (1) a scheme or artifice to defraud, (2) a fraudulent misrepresentation or omission, and (3) an act, practice, or course of business that operates as a fraud. As a result, the jury could have relied upon either theory (1) or theory (3) with respect to Isaacs and Brgoch. A scheme or artifice, or an act, practice or course of business, does not necessarily require a misrepresentation. The jury could lawfully have convicted Harry on Counts 2 and 3 without finding that he made *any* misrepresentation or omission to Isaacs or Brgoch. If the jury chose to believe that Harry devised a scheme or artifice to defraud Isaacs or Brgoch, or engaged in an act, practice, or course of business that operated to defraud them, then by definition Harry's wrongful acts must have been conceived of and initiated no later than the moment when Harry purchased the Red River units in the name of Isaacs and Brgoch. Because Harry's fraud under these two portions of Utah Code Ann. § 61-1-1 (1989) does not postdate the securities transactions, it is actionable even under the theory put forth in Harry's brief. Indeed, the Eleventh Circuit Court of Appeals in Rudolph v. Arthur Anderson & Co., 800 F.2d 1040 (1986), while agreeing in general with Harry's

argument, established that even misrepresentations or omissions that occur after a transaction is completed are "in connection with" the transaction if they are part of a scheme that was devised before the transaction began. 800 F.2d at 1046-1047.

B. BEFORE THE INVESTMENT WAS COMPLETED, HARRY OMITTED TO TELL ISAACS AND BRGOCH THAT HE WAS INVESTING IN RED RIVER IN VIOLATION OF THE LIMITS THEY PLACED UPON HIS DISCRETION.

Isaacs and Brgoch met frequently with Harry to discuss their investments. After they retired in 1985, their investment strategies changed and they became more cautious investors. By 1988 they had limited Harry's authority by requiring that investments be safe and liquid; they expressly prohibited Harry from investing in any more limited partnerships or investments that had potential future payments. Harry agreed to these limits. At the moment that Harry decided to invest in Red River for Isaacs and Brgoch he knew that the investments would exceed his authority. At that time, before the investments were made, Harry was under a duty to contact the investors, inform them of the true nature of Red River, and obtain from them permission to make the purchase, which was beyond the scope of Harry's discretionary authority. Instead of contacting the investors, however, Harry (to paraphrase Utah Code Ann. § 61-1-1(2) (1989)) *omitted to state material facts (the true nature of Red River and his intention to invest in it) necessary in order to make his previous statements to Isaacs and Brgoch (that he would only invest in accordance with their instructions), in the light of the circumstances under which they were made, not misleading.* Under this theory, which was presented

to the jury, Harry's omission precedes the consummation of the securities transactions, and is therefore "in connection with" those transactions even under the reasoning in Harry's brief.

C. HARRY MADE MISREPRESENTATIONS AND OMISSIONS TO ISAACS AND BRGOCH AT A TIME BEFORE THEY BECAME "IRREVOCABLY COMMITTED" TO THEIR RED RIVER INVESTMENTS.

Isaacs and Brgoch met with Harry on a number of occasions in the two months following Harry's purchase of the Red River units. Harry repeatedly mischaracterized the investment. For example, when Brgoch first met with Harry in May, around the time of the investment, Harry left Brgoch with the impression that it was a real estate development bond. Even when Brgoch learned a month later that Red River was a limited partnership, and confronted Harry about the investment, Harry did not disclose the obligation to make future payments. Neither Isaacs nor Brgoch learned of the possibility of future payments until they received their first dunning letters nearly a year later. R. at 838, 928; Exhibits P-6, P-9.

These misrepresentations and omissions to both Isaacs and Brgoch, made during the two months after Harry purchased the units, were designed to lull Isaacs and Brgoch into accepting the Red River investments. They were made before the purchases were truly final. Of course, from Red River's perspective the purchases appeared final; the money had been received and the transactions registered. The transactions were not final, however, because Harry made the purchases without any authority. It is axiomatic that acts made by a purported agent without authority are subject

to revocation by the principal. Such acts are not final until they are ratified by the principal, either expressly or by implication. Because Isaacs and Brgoch had at least a colorable right to rescind the Red River purchases at the time when Harry lied to them (shortly after the purchases had been made), the transactions were not irrevocably complete, and his misrepresentations and omissions were in connection with the still unratified purchases of securities.

D. THE "IN CONNECTION WITH" REQUIREMENT SHOULD BE INTERPRETED LIBERALLY TO APPLY TO SOME TYPES OF POST - PURCHASE OR SALE MISREPRESENTATIONS AND OMISSIONS.

As demonstrated by the foregoing arguments, the question of whether the phrase "in connection with" can apply to misrepresentations or omissions made after exclusively a purchase or sale should not be relevant to this case. To the extent that the issue may be deemed relevant, it is the State's position that the requirement should be liberally construed to include the type of conduct demonstrated in this case.

The general rule, as discussed at length in Point V.B., *supra*, is that the "in connection with" language of securities fraud statutes should be liberally construed to include cases where the fraud "touches" upon the offer, sale, or purchase of a security. There is some federal case law to the effect that a misrepresentation or omission is only "in connection with" the purchase or sale of a security if it occurs before the purchase or sale is finalized. See, e.g., Rudolph v. Arthur Andersen & Co., 800 F.2d 1040, 1046 (11th Cir. 1986) and cases cited therein. The

specific language of the cases shows, however, that this restriction is not as rigid as it may appear to be.

In Securities and Exchange Commission v. National Student Marketing, 457 F.Supp 682 (1978), a case relied upon by the defendant, there is an excellent discussion of the rule, its rationale, and its implications:

> The rationale for using the moment of commitment as the critical point in time derives from the underlying purpose of the anti-fraud provisions to protect the investment decision from inadequate disclosure and misrepresentations. Once the decision is made and the parties are irrevocably committed to the transaction, there is little justification for penalizing alleged omissions or misstatements which occur thereafter and which have no effect on the decision.

Id., 457 F.Supp at 703 (emphasis added). If this were a case where the victims had been "irrevocably committed to the transaction," then the defendant *might* have a legitimate point, if you do not look carefully at the policy implications. As it is, both Isaacs and Brgoch could have taken steps to revoke or rescind the transaction except for Harry's misrepresentations. They were not "irrevocably committed," if they have ever been, until after they decided, based upon Mr. Harry's misrepresentations, to do nothing for a year.

The facts behind the defendant's remaining three cases, Congregation of the Passion, Holy Cross Province v. Kidder, Peabody & Co., 800 F.2d 177 (7th Cir. 1986), Braka v. Multibanco Comermex, S.A., 589 F.Supp 802 (S.D.N.Y. 1984), and Resource Investors v. Natural Resource Investment Corp., 457 F.Supp 194 (E.D.Mich. 1978), are readily distinguishable. The Congregation of the Passion case

involved a defendant who had "full discretion to develop and implement a prudent portfolio strategy." 800 F.2d at 181. In Braka, the court found that "[t]he alleged misrepresentation and nondisclosures could have had no effect on the plaintiff's decision to purchase the CDs." 589 F.Supp at 805. The alleged misrepresentations were made fully 10 months after the sales were finalized. Id. In Resource Investors, the defendant "had no relationship with any of the other parties in this lawsuit until one year after plaintiff's purchase." 457 F.Supp at 197.

The policy behind the cases cited by the defendant is designed to limit the applicability of securities anti-fraud provisions to situations in which the fraud affected the securities transaction. In each case, the fraud alleged did not affect the transactions, either because the fraud occurred entirely after the transactions were irrevocably consummated, or the person committing the alleged fraud had the independent power and authority to enter into the transactions regardless of the fraud. This policy is in no way furthered by prohibiting the application of Utah Code Ann. § 61-1-1 (1989) to a situation where the misrepresentations and omissions (to take the case most favorable to Harry) occurred after the transaction, but were part of a lulling technique designed to hide the fact that the defendant violated his authority in making the transactions. In that case, policy considerations should favor application of the anti-fraud provisions because they are necessary to ensure the integrity of the securities markets. This is particularly true where the defendant is a stockbroker, with

fiduciary duties to his clients. For our capital markets to operate effectively, people need to know that their stockbrokers are not trading their accounts without authority and then hiding that fact. Such fraudulent behavior falls within the plain language of Utah Code Ann. § 61-1-1 (1989), and should be prohibited under Utah law.

CONCLUSION

Only points I, II, III and IV of the defendant's brief would constitute grounds for a new trial. Because they do not challenge the verdict with respect to Count 1, points V and VI are only relevant to Counts 2 and 3 (point VI) and 4 (point V).

Points I (expert testimony) and II (specific intent) are expressly resolved in favor of the State by the Larsen decision, which also effectively defeats the defendant's argument in point III (good faith defense). The argument that Mr. Barber's assistance was ineffective (point IV) is without merit, as the alleged errors appear to have been tactical decisions, and even if they represented actual errors the defendant has not shown with demonstrable evidence that there is a reasonable likelihood that the trial's outcome would have been different but for the errors. Count 4, concerning Private Ledger (point V), was properly pled as securities fraud because the statute by its language does not limit the class of victims to investors, and because the scheme to defraud Private Ledger of its commission was by definition in connection with the sale of the securities that generated the right to that commission. Point VI (concerning Counts 2 and 3) fails to

recognize that there was an ongoing scheme to defraud Seymour Isaacs and Frank Brgoch which by definition must have predated the actual purchase, and that Isaacs and Brgoch were in regular contact with the defendant prior to the actual purchase during which time the defendant omitted material facts. Point VI also argues for an overly restrictive reading of the "in connection with" requirement, particularly in a case where the victims did not expressly authorize the purchase, and could have reasonably attempted to rescind the purchase but for the defendant's misrepresentations and omissions shortly after the purchase.

The jury's verdict, and the trial court's ruling in this case, should be affirmed.

RESPECTFULLY SUBMITTED this 28th day of May, 1993.

JAN GRAHAM
Attorney General

DAVID N. SONNENREICH
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May, 1993, I caused to be [X] hand delivered [ ] mailed, postage prepaid, a true and correct copy of the foregoing Brief of Appellee to:

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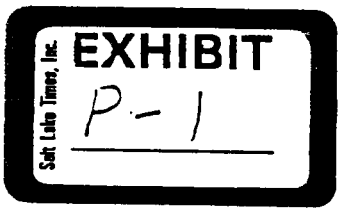
ADDENDUM A



PRE-OFFERING SUMMARY

Red River Mountain Limited Partnership,
an Arizona Limited Partnership

1201 South Alma School Road, Suite 12950
Mesa, Arizona 85210

(602) 834-7400

THIS PRE-OFFERING SUMMARY CONSISTS NEITHER AN OFFER TO SELL NOR A SOLICITATION OF AN OFFER TO BUY SECURITIES. AN OFFER TO BUY SUCH SECURITIES CAN BE MADE ONLY BY THE CONFIDENTIAL PRIVATE PLACEMENT MEMORANDUM AND ONLY TO PERSONS MEETING CERTAIN FINANCIAL REQUIREMENTS AND WHO ARE BONA FIDE RESIDENTS OF STATES IN WHICH THE OFFERING IS AUTHORIZED.

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SUPPLEMENT

PARTNERSHIP OBJECTIVE

The objective of RED RIVER MOUNTAIN LIMITED PARTNERSHIP is to combine two diversified properties in the attempt to take advantage of a young land market (Red River 160 acres), and also to follow the dynamic growth and transportation corridors (Red Mountain Expressway 13.4 acres) within the Phoenix metro area.

The 160 acres in Stanfield, Arizona is located within the old John Wayne Ranch which he named "Red River". The 13.4 acres is situated in the Mesa area along a future freeway referred to as the Red Mountain Expressway. Hence, the partnership combined the names Red River and Red Mountain Expressway to form Red River Mountain Partners.

THE EAST VALLEY

RED MOUNTAIN

The East Valley is growing at an increasingly greater rate than any other region in the Greater Phoenix Metropolitan area and represents a major urban center in its own right. One reason for the popularity of the East Valley is the excellent reputation of the school systems. Moreover, six major east-west transportation corridors are separated by only three miles. University Drive, Main Street, Broadway Road, Southern Avenue, the Superstition Freeway and Baseline Road provide transportation corridors throught the heart of the East Valley.

Mesa was founded in 1878 and incorporated in 1883. The city grew an estimated 53% between 1980 and 1985 and is Arizona's third largest city with a current population of approximately 233,000. Mesa covers more than 90 square miles, and is located approximately 4 miles east of Phoenix, the Arizona state capital. Mesa is considered the retail, trade and medical center of the East Valley which includes the cities of Mesa, Tempe, Chandler, Gilbert and Apache Junction. The East Mesa area is expected to become an attractive area for families and businesses in the future due to the completion of the Superstition and Red Mountain Freeways which will provide residents with quick access to downtown Mesa and Phoenix.

THE PROPERTY

RED MOUNTAIN

The Property is located at the northwest corner of University and the proposed Red Mountain Freeway in the region which was recently strip annexed to the southeast part of Mesa, which is the third largest and fastest growing city in the State of Arizona. It is located in the eastern part of the Planning Area of the city of Mesa, approximately 12 miles from the center of downtown Mesa. Continued and sustained growth has made Mesa the home of more than 140 companies including McDonnell-Douglas Helicopter Company ("McDonnell-Douglas") which employs more than 4,500 people. McDonnell-Douglas has moved some operations from Culver City, California to Mesa, contributing to employment growth in Mesa. Also in Mesa, southwest of the Property, is Williams Air Force Base, one of the largest jet pilot training base in the Western world. This facility also adds to the stability and economic growth of Mesa.

Many new residential and commercial developments are currently underway in the vicinity of the Property including Alta Mesa by Estes Homes. When complete, this 867 acre development will have over 3,400 housing units, complete with a golf course, lakes and greenbelts. To the southwest of the Property are several other large-scale developments which have substantially impacted Southeast Mesa including Sunland Village East, a 600 acre masterplanned retirement community, and the Crossings, a 1,000 acre proposed development being masterplanned by American Continental. Leisure World, Golden Hills, Fountain of the Sun and Desert Sands represent four additional developed residential communities totaling in excess of 2,000 acres.

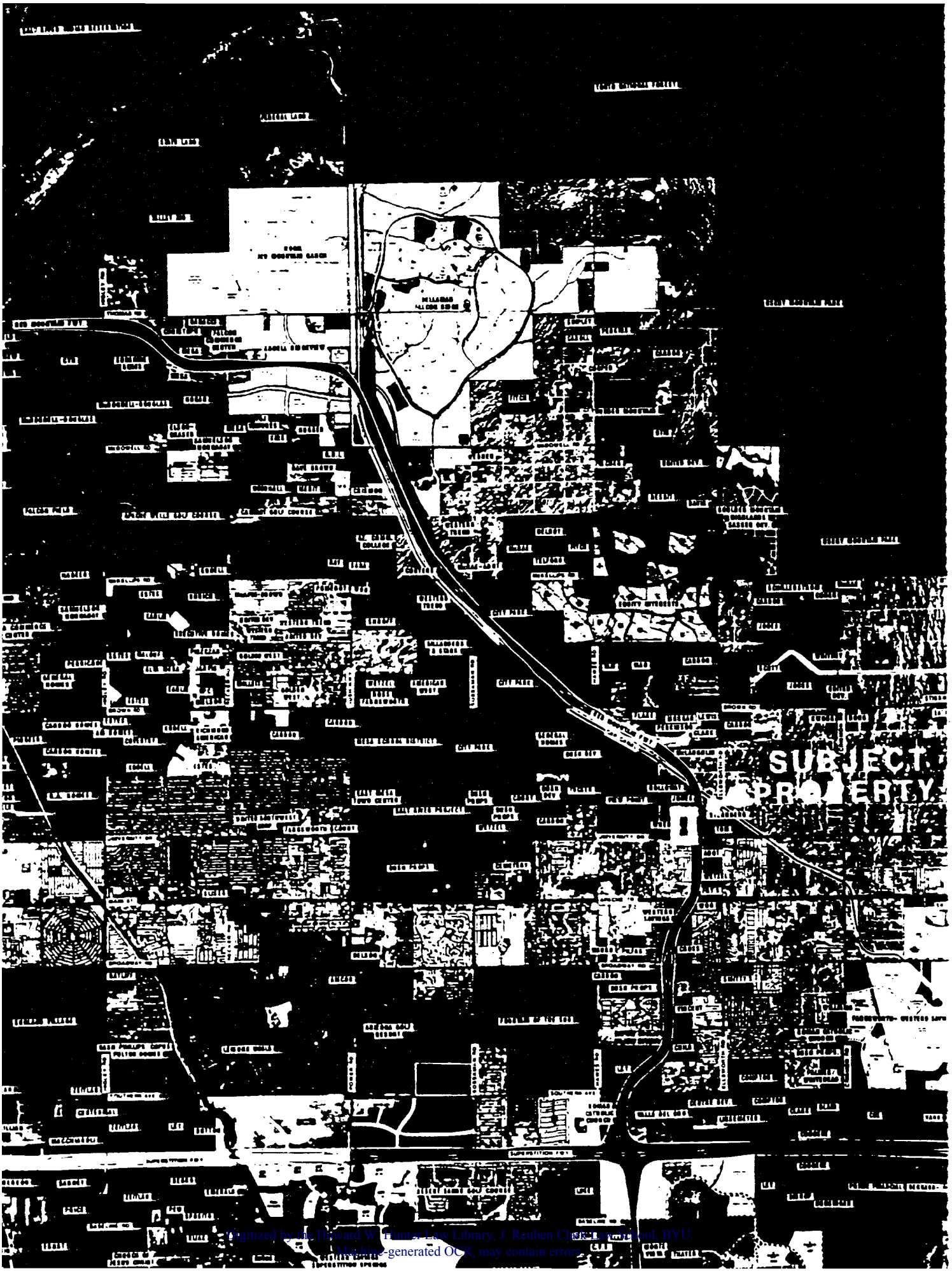
Also impacting this region will be the completion of Western Savings' 1,680 acre masterplanned development, Superstition Springs and the East Valley Town Center, which are in the primary stages of development. Included within the project plans is a one million square foot regional mall with anchor tenants expected to include major retail stores such as Goldwaters, Dillards, Sears and J.C. Penney's.

ADOT (Arizona Department of Transportation) has committed the funds for the completion of the Superstition Freeway Extension as well as the Red Mountain Freeway and the San Tan Freeway.

The Superstition Freeway currently ends at Power Road, five miles southwest of the Property. Current plans call for construction to begin at Power Road in early 1988 and end at U.S. Highway 60 in 1991 with an off-ramp located at Ellsworth Road,

less than two and one-half miles south of the Property. The completion of the Superstition Freeway will connect the I-10 Freeway and the East Valley with Apache Junction and the further eastern regions of Arizona. Also being engineered is a major stacked interchange west of Ellsworth Road (2 miles south of the site). This would serve as the confluence of three freeways in Maricopa County: the Superstition Freeway, the San Tan Freeway and the Red Mountain Freeway.

The Red Mountain Freeway has a proposed completion date set for the year 2000; it will connect Sky Harbor airport, the downtown Phoenix with Mesa's industrial core, providing easy access to Falcon Field and east Mesa's new residential developments.



OFFICE/RETAIL DEVELOPMENT
NWC UNIVERSITY DR. & RED MTN. FREEWAY
RED MOUNTAIN INTERCHANGE LTD.
MESA, ARIZONA

NELSON ALDRICH ARCHITECTS, A.I.A.

SITE DATA

MAJOR 1	37,200	2.00 AC
SHOPS A	10,200	
SHOPS B	12,625	1.31 AC
PAD A	3,000	.92 AC
PAD B	4,000	.23 AC
PAD C	4,000	.55 AC
OFFICE A	17,000	
OFFICE B	19,000	
OFFICE C	19,000	
OFFICE D	19,200	
	TOTAL 215,225 S.F.	

PARKING PROVIDED 760 SP

13.44 AC NET LOT COVERAGE 36%

VICINITY MAP

SITE PLAN

CASA GRANDE/STANFIELD AREA

RED RIVER

The Casa Grande/Stanfield area is a midway point between Phoenix, 53 miles to the Northwest, and Tucson, 59 miles to the Southeast, Arizona's two largest metropolitan cities.

The area has a population of about 20,000 with projections indicating a growth of an additional 55,000 people by the turn of the century. Major laboratories have moved into the Casa Grande area in recent years and planners and developers expect that this influx will continue.

Landowners in the area are so convinced that the Casa Grande/Stanfield area will emerge as a bona fide suburb of the greater Phoenix area that they have undertaken a cooperative effort to formulate masterplans for almost 50,000 acres of land in the area. The result will be known as StanMar Valley. A subsection of the Stanmar Valley area is an 11,000-acre self-contained community known as Red River, which is on the site of a ranch formerly owned by John Wayne.

THE PROPERTY

RED RIVER

The property is an easily accessible 160 acre site located in the area known as Red River. Red River is now included in the StanMar Valley Masterplan. The site has frontage on both White Parker Road and Highway 84 and is contiguous to the 11,000 acre Red River Masterplan, but is not subject to the masterplan assessments.

The southeast quadrant of metropolitan Phoenix is experiencing tremendous growth. Both the Northwest and Southeast Valley have excellent transportation routes. The Black Canyon Freeway and Interstate I-17 serve the Northwest Valley and the Superstition Freeway (State Highway 360) and Interstate I-10, the Southeast Valley. An expansive new freeway system funded by a one-half cent sales tax increase will further enhance development in the Northwest and Southeast Valley.

An additional contributor to growth in both the Northeast and Southeast has been the location of major manufacturing companies in these areas. The Southeast Valley, however, is emerging as the new urban hub of metropolitan Phoenix with high technology plants being the major contributor. The Southeast Valley has a competitive edge over the Northwest Valley because of its close proximity to Sky Harbor International Airport, downtown Phoenix, Arizona State University, and Arizona State Research Park. Additional inducements for companies to locate in the Southeast Valley are a varity of residential choices, retail and community services, quality schools, lower power costs and availability of water. The Southeast Valley, unlike other areas of metropolitan Phoenix, offers both a place to live as well as work.

Red River, 23 minutes from the edge of development in the Southeast Valley, is one of the few large parcels closest to this area available for development. The majority of the land in between Red River and the southern edge of the Southeast Valley is Indian Reservation or Federal lands with the exception of the small town of Maricopa.

Casa Grande has already been experiencing a tremendous amount of "spin-off" growth from the Southeast Valley. Because of its strategic location at the intersection of Interstates I-10

and I-8, businesses are easily able to access the large Southern California and Southwest markets. In addition, its location approximately half-way between the State's two major metropolitan markets, Phoenix and Tucson; its rail access; and its cooperative growth-oriented city officials all will continue to fuel development in the Casa Grande area.

Red River, 10 miles closer to Phoenix than Casa Grande, offers an attractive alternative lifestyle to the Southeastern Valley as well as numerous residential, retail and employment opportunities.

PROPERTY DATA SHEET

	RED MOUNTAIN	RED RIVER
TYPE OF PROPERTY:	Unimproved	Farm land
LOCATION:	NWC 90th St. (Red Mountain Freeway) and University Dr. Mesa, Arizona	SW 1/4 of Section 24 T6S, R3E of the G&SRB&M Stanfield,AZ
SIZE:	13.437 acres	160.3313 gross acres
ZONING:	Rural	Agriculture
PRICE:	$1,300,000	$1,037,874
TERMS:	$260,000 down $870,658 first deed of trust interest only payable at 10% for first 10 years, thereafter 3 annual installments beginning in 1999 of $350,104	$175,000 down $479,874 first deed of trust, interest at 10%, payable interest only in 1988 and 89 thereafter in 10 annual installments of $83,326
	$169,342 second deed of trust, interest at 10% payable in 5 annual installments of $44,672	$168,000 second deed of trust, 10% interest, no payments until 1991, thereafter in 9 annual installments of $35,006
		$220,000-10% interest payable in 5 annual installments of $58,035

THE PROPOSED OFFERING

The Partnership will offer 110 units of limited partnership interest with an initial capital contribution of $5,100 per unit (minimum 3 units). Upon successful completion of the offering, $561,000 in initial capital contributions will be raised. The chart below shows the proposed schedule of additional contributions an investor would be required to make should the Property be held through the full amortization of the acquisition financing. WHILE THE PARTNERSHIP OBJECTIVE IS TO SELL THE PROPERTY WITHIN THREE TO FIVE YEARS, THERE IS NO ASSURANCE THAT THIS OBJECTIVE CAN BE ACHIEVED AND THE PARTNERSHIP MAY HOLD THE PROPERTY FOR THIRTEEN YEARS OR LONGER.

LIMITED PARTNER'S CONTRIBUTION SCHEDULE

Initial Capital Contribution: (Per unit - minimum 3 units)	$5,100
April 25, 1989	$ 2,885
April 25, 1990	2,885
April 25, 1991	2,885
April 25, 1992	2,885
April 25, 1993	2,885
April 25, 1994	2,885
April 25, 1995	2,235
April 25, 1996	2,235
April 25, 1997	2,235
April 25, 1998	2,235
April 25, 1999	2,875
April 25, 2000	2,875
April 25, 2001	2,875
	$39,975

The maximum potential contribution per unit is $39,975 payable in 13 installments through April 25, 2001. If, as anticipated, the Property is sold at a profit prior to the fifth year from closing, then no additional capital contributions would be due after the date of sale.

PARTNERSHIP CAPITALIZATION

Initial Capital Contribution from Limited Partners	$ 561,000
Term Financing	$3,836,250
Total Capitalization	$4,397,250

USES OF PROCEEDS

Selling Expenses	$ 59,500
Organization and syndication fees	25,000
Purchase price of property	2,337,874
Interest expense	1,590,023
Syndication costs	31,500
Net operating expenses	308,680
Reserves	44,673
Total Application of Funds	$4,397,250

PARTNERSHIP OBJECTIVES

Red River Mountain Limited Partnership will be a private placement limited partnership designed to offer the sophisticated investor the potential for capital appreciation as part of a diversified investment portfolio. To achieve this objective, the Partnership has acquired for investment a 160 acre parcel in the Stanfield, Arizona area and a 13.4 acre parcel along a proposed freeway referred to as the Red Mountain Expressway, in Mesa, Arizona. The Partnership's objectives are to:

* Provide capital appreciation
* Preserve and protect investor's invested capital
* Provide build-up of Partnership equity through the reduction of mortgage indebtedness encumbering the property.

DISTRIBUTION OF PROCEEDS

Net proceeds from refinancing or sale of the Properties shall be at the discretion of the General Partners until such time as both Properties have sold. Upon the sale of the Properties, proceeds shall be distributed 100% to the Limited Partners until they have received all of their invested capital and thereafter 80% to the Limited Partners and 20% to the General Partners.

PROJECTED CASH RETURN FOR A ONE-UNIT LIMITED PARTNERSHIP INTEREST FOR THE PERIOD MAY 1, 1988 THROUGH THE HYPOTHETICAL DISSOLUTION OF THE PARTNERSHIP ON MAY 1, 1993 ASSUMING A SALE OF THE PROPERTIES AT MARKET VALUE. HOWEVER, THERE IS NO ASSURANCE THAT THE PROPERTIES WILL SELL DURING THE SAME YEAR. IF THE PROPERTIES ARE SOLD IN DIFFERENT YEARS, THE CASH INVESTMENT AND PROCEEDS WILL DIFFER FROM THE HYPOTHETICAL CASE PRESENTED BELOW.

YEAR	CASH INVESTMENT	CUMULATIVE CASH INVESTMENT	ESTIMATED NET SALE PROCEEDS	CASH RETURN
Subscription	$5,100	$ 5,100		
1989	2,885	7,985		
1990	2,885	10,870		
1991	2,885	13,755		
1992	2,885	16,640		
1993 sale	n/a	16,640	$25,192	$23,481

The projected amounts do not reflect any income tax consequences.

THE MANAGING GENERAL PARTNERS

ROSS N. FARNSWORTH, JR.

One of the General Partners of Red River Mountain Limited Partnership is Ross N. Farnsworth, Jr. who is 31 years old. Ross graduated from Brigham Young University with a Bachelor of Science degree. Ross supervised the entire commercial department of Farnsworth Realty and Development from 1980 until 1984. During this time he invested client funds in various real estate projects ranging from syndicated land, commercial and industrial property and the development and management of multi-family projects.

From 1984-1986 Mr. Farnsworth was President of Farnsworth, Perkinson & Smith, Inc., a commercial real estate company who acquired nearly 1000 acres of multi-use land, closed 4 of its own syndicated offerings, constructed two multi-family projects, a retail shopping center, medical office building, entered into several raw land joint ventures and initiated the development of the largest deed restricted medical park in Arizona.

In 1986 Mr. Farnsworth opened his own office, Farnsworth Holdings, Inc. which specializes in the acquisition, development and syndication of raw land. In November 1986, Farnsworth Holdings moved into the largest office complex in Mesa, the sixteen-story Western Savings Financial Center.

CREGG CANNON

Cregg Cannon, also a General Partner, has worked as in Investment Banker with the Wall Street firm of Smith Barney Harris Upham, Inc. a New York Stock Exchange member. Mr. Cannon, during his time at Smith Barney, managed funds in areas such as commercial real estate located in the sunbelt area, tax free municipal bonds, oil and gas and other fixed income investments.

Mr. Cannon served as Vice President of Investments for Prudential Bache Securities from 1984 until 1987. He managed individual and institutional accounts in fixed income and real estate. Some of the large real estate syndicators with which he worked were First Capital, The Related Companies, Century Properties and Consolidated Capital, Inc.

In 1987, Mr. Cannon opened his own office, Cannon Capital, Inc., located in Salt Lake City, Utah. He also is the manager of a major New York Stock Exchange firm in Salt Lake City, Utah.

THE INFORMATION HEREIN WAS OBTAINED BY THE GENERAL PARTNER FROM SOURCES DEEMED TO BE RELIABLE. NO ASSURANCE MAY BE GIVEN WITH RESPECT TO THE ACCURACY OR ADEQUACY OF INFORMATION OBTAINED FROM PERSONS WHO ARE NOT AFFILIATES OF THE GENERAL PARTNER.

THIS PRE-OFFERING SUMMARY IS, THEREFORE, QUALIFIED IN ITS ENTIRETY BY REFERENCE TO THE CONFIDENTIAL PRIVATE PLACEMENT MEMORANDUM, A COPY OF WHICH WILL BE PROVIDED AND RECEIPT ACKNOWLEDGED BY EACH PERSON WHO SUBSCRIBES FOR SECURITIES OF RED RIVER MOUNTAIN LIMITED PARTNERSHIP (THE PARTNERSHIP) BEFORE SUCH SUBSCRIPTION.

ROSS N FARNSWORTH JR AND AFFILIATED COMPANIES AND PARTNERSHIPS
PRIOR EXPERIENCE IN THE PURCHASE AND SALE OF LAND

PROPERTY	DATE OF PURCHASE	MONTHS HELD	GROSS PURCHASE PRICE	GROSS SALES PRICE	GROSS AMOUNT OF GAIN	ANNUAL RETURN
POWER ROAD 1	03/01/83	16	$864,013	$1,365,485	$501,472	43.5%
POWER ROAD 2	06/01/83	13	775,000	1,073,777	298,777	35.6
QUEEN CREEK	10/31/84	1	2,200,000	2,504,000	304,000	165.8
ARIZONA AVENUE 1	01/03/85	12	3,585,504	5,712,562	2,127,058	59.3
ARIZONA AVENUE 2	01/03/85	8	3,676,590	5,406,937	1,730,347	70.5
GILA BUTTE ESTATES	05/31/85	7	2,320,000	3,191,563	871,563	64.4
CASA GRANDE QUARTER SECTION	03/15/85	3	800,000	1,230,000	430,000	215.0
SOSSAMAN 40	05/18/85	1	450,000	535,000	85,000	226.7
CRISMON QUARTER SECTION	03/15/85	13	4,050,000	5,380,000	1,330,000	30.3
FCAX HAWES RD LTD PTSHP	08/07/84	27	1,453,000	2,880,243	1,427,243	43.7
ATC STANFIELD LTD PTSHP	01/14/88	N/A	1,744,000	N/A	N/A	N/A

NOTE: The information contained in the table should not be considered indicative of the possible results from the operation of the partnership. This information in no manner implies or indicates that investors in the offering will experience returns or cash distributions, if any, comparable to those experienced by the owners of the projects specified in the table.

SUPPLEMENT

LOCAL/STATE

ouncil recommends ute for freeway leg

ity Council Monday recommended a route n leg of the Red Mountain Freeway that northeast side of the Central Arizona and the Spook Hill flood control dike.

leted, the Red Mountain Freeway will run y's northern boundary and will connect th Tempe and Scottsdale. It also will hook erstition Freeway near Ellsworth Road.

nendation, numbered B-1 from a series of utes proposed by Tempe consulting firm kerhoff, Quade and Douglas, will go to the urtment of Transportation, which will l determination of the route.

il rejected the arguments of a e of the Spook Hill Homeowners' ho asked that the freeway follow an ng the southwest side of the canal.

s, 3220 N. 82nd St., said the southwest uld have less of an impact on the area d be built below ground level like parts of n Freeway.

n the northeast side of the canal would rated because it crosses a flood plain, he

id a freeway in the northeast side would open the area to industrial, commercial and high-density development, while the homeowners would prefer it to remain as natural desert and low-density housing.

David Udall, attorney for Bellamah Community Development Co., which is planning a three-square-mile community northeast of Bush Highway and McDowell Road, supported the B-1 alignment.

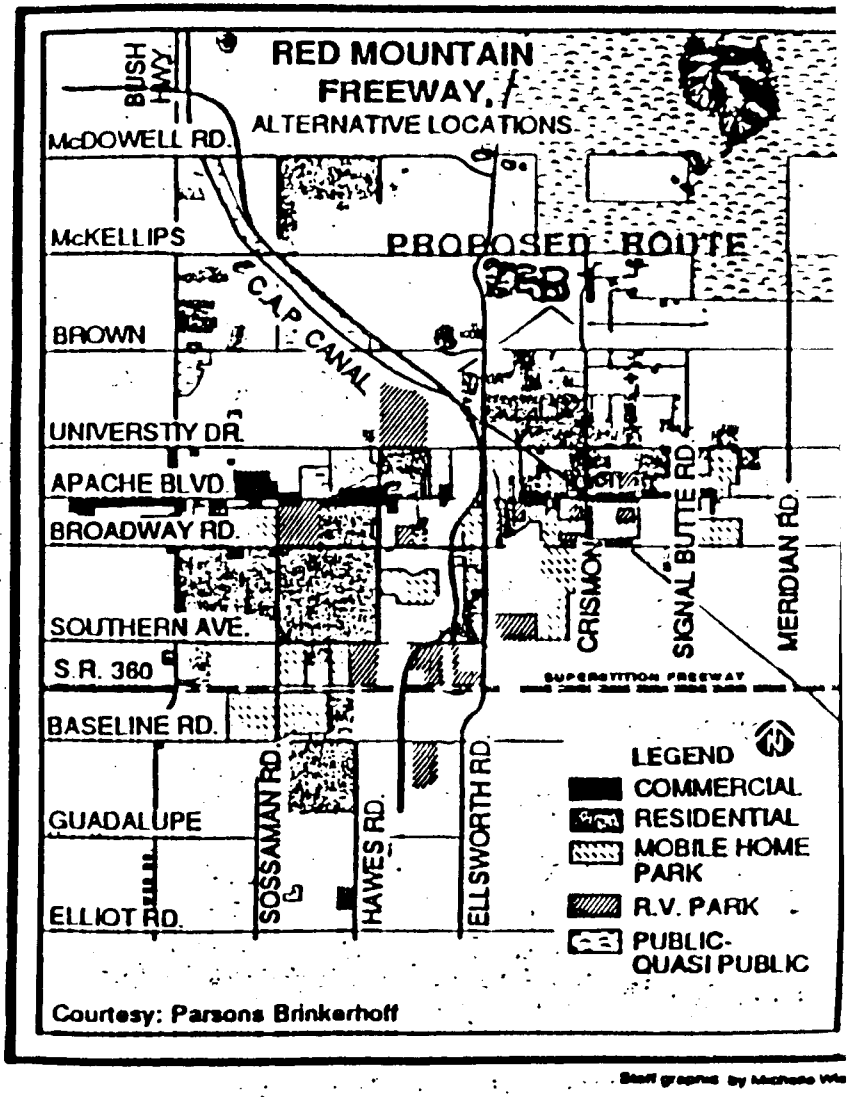
"Freeways exist to serve people, and this route will open up land to be served," he said.

The council voted unanimously for the B-1 corridor, saying the alternative on the southwest side of the canal would have a greater impact on existing and future developments, including a city water treatment plant, city park and proposed community college.

In other action, the council approved annexation of 1,570 acres of state-owned land along McKellips Road east of the CAP canal, which would be crossed by the Red Mountain Freeway and could become the site of a large planned community in the future.

The state plans to auction off the property after a master plan is drawn up for the area.

The council also approved an ordinance that would provide for removal of abandoned vehicles on private property, and approved joining the Arizona Muncipal Finance Pool, which will provide cities and school districts with a $450 million fund to borrow from.



Staff graphic by Michele Wa

SERVING THE EAST VALLEY

The Mesa Tribune

Tuesday — October 7, 1986 — Vol. 38, No. 251 — 40 pages — A Cox Newspaper — Mesa, Arizona — 25 cents

Mesa growth rate increases

Half-million residents forecast within 30 years

By Mike Padgett
Staff writer

PHOENIX — Mesa, the nation's second-fastest-growing city above 100,000 during the 1970s, should grow from 272,000 to more than a half-million during the next 30 years, according to a report that estimates the Valley's faster growth countywide there had been projected just six months ago.

East Valley cities are strengthening their status as the Valley's fastest-growing areas in population and jobs, according to a report from Mountain West Research-Southwest Inc.

Chandler is growing faster than any other local city. It doubled in size from 1980 to 1985 and is expected to quadruple from its 71,700 population today to nearly 300,000 in 30 years, said Eric Anderson, chief executive officer of Mountain West Research Southwest.

Anderson's firm compiled the $60,000 report for the Maricopa Association of Governments. Anderson is scheduled to present his report Wednesday at the MAG's management committee meeting in Phoenix.

Joining Chandler in the rapid growth are Mesa and Tempe. Anderson's report says Mesa's population should jump to more than 562,000. Tempe's 133,300 population is projected to nearly double, totalling 250,100.

For Mesa, today's employment total of 80,100 is estimated to reach nearly 202,000. In Tempe, the employment total of 73,700 is projected to nearly double to more than 141,000.

The East Valley's growth is only one part of Maricopa County's projected growth picture, Anderson said.

"We're projecting countywide between now and 1995 an average growth of 100,000 persons per year," Anderson said. "That's adding a little less than a million people over the next 10 years."

That jump of 1 million new residents over the next 10 years — or about 100,000 annually — is about 1½ times the Valley's growth rate over the past five years. During that period, the Valley's population grew from 1.5 million in 1980 to 1.6 million in 1985, or about 66,000 annually, Anderson said.

According to a copy of Anderson's report, the county's population by 2015 is estimated at 4.5 million, which is 123,000 more than projected last spring. Currently, the total county population is nearly 1.8 million.

Phoenix's 1985 population of 912,700 should increase to 1.8 million by 2015. Its 1985 employment figure of 337,600 should increase to 823,100, according to the report.

East Valley Growth Predictions

POPULATION	1985	2015
MESA	272,000	562,000
TEMPE	133,300	250,100
CHANDLER	71,700	307,800

TOTAL EMPLOYMENT	1985	2015
MESA	80,100	202,800
TEMPE	73,700	141,400
CHANDLER	136,400	136,500

DEVELOPED RESIDENTIAL AREAS	1985	2015
MESA (118.6 TOTAL)	57.8 SQ. MI.	82.3 SQ. MI.
TEMPE (70.0 TOTAL)	16.4 SQ. MI.	19.4 SQ. MI.
CHANDLER (107.9 TOTAL)	16.6 SQ. MI.	32.6 SQ. MI.

CASA GRANDE DISPATCH

11-19-87

County Panel OKs Red River Proposal

By LINDA COULSON
Staff Writer

FLORENCE — A plan that one day could convert 20,000 acres surrounding the late John Wayne's Red River Ranch into a bustling self-contained community received approval from a county planning and zoning commission Wednesday.

The Pinal County Planning and Zoning Commission voted unanimously to send the Red River Area Plan to the county board of supervisors with a favorable recommendation.

Red River is part of the 46,000-acre StanMar Valley, a series of area plans in the Stanfield/Maricopa area scheduled to complete a patchwork quilt of development between Casa Grande and southeast Phoenix.

Planners from A. Wayne Smith & Associates have been working with county planning staff and Stanfield area landowners since last February, following the commission's initiation of the Red River Area Plan.

The land use guide includes approximately 12,050 acres owned by Karl Eller, chief executive officer of the Circle K Corp., and his partner in the joint venture, Timothy R. Olson, of Paragon Homes. Also included are 2,450 acres of state-leased land.

Eller bought the land from Wayne's former partner, Louis Johnson of Stanfield, in 1979, and sold a portion to Olson last year. Since then, approximately 5,000 acres have been sold, said Christin Laraway, Red River vice president.

The majority of the proposed area plan lies west of Stanfield between White Parker and Maricopa Roads.

Beginning a half-mile north of Interstate 8, the property extends approximately 3½ miles north to the southern boundary of the Maricopa Indian Reservation. The remaining portion, approximately 20 percent of the total area development, lies east of Stanfield, between Highway 84 and Interstate 8.

County officials intend the land use plan to serve as a blueprint for development in the Standfield area, approximately 25 miles south of Phoenix.

The area is scheduled to include residential, commercial, industrial, recreational and community uses, including seven public schools sites and inter-connecting parkway boulevards.

However, several developers during the planning process expressed concern about odor produced by a cattle feed lot in the middle of the plan.

Michael B. Withey, Phoenix attorney representing Red River, said Bennedict Feed Lot now is highlighted in red to alert prospective land buyers they may be in an "odor" zone.

Meanwhile, Withey said planners added four sections to the plan's narrative to protect Bennedicts by spelling out "in no uncertain terms they have a right to remain, in operation and anyone who wants to develop around them should be aware of that."

Withey said in the future, a 2½-mile odor zone will be drawn around the lot.

Timothy Kaehr, Red River Resources, Inc., said another feed lot within the plan owned by his company is scheduled to be phased out once development in the area begins.

"It may not be viable 10-15 years from now," he said said of the Red River Feed Lot. "Over the last 10-15 years there has been a drastic reduction in the number of feed lots in the United States."

In other business Wednesday, the commission:

— Unanimously favored a proposal to rezone the Town of San Manuel from general rural to 334 acres of residential, one acre multiple residential, 120 acres of retail business and 94.5 acres of mobile home park.

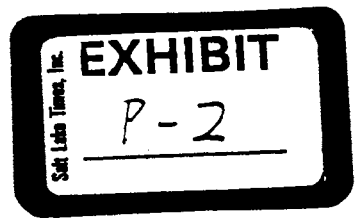
The remainder of the town would remain general rural to accommodate churches and schools.

San Manuel formerly was owned by Magma Copper Co., and has been zoned general rural since 1962, said George O'Brien, of Magma.

O'Brien said now that the company is trying to get out of the real estate business, it is trying to sell the town's homes, which requires zoning changes.

He said 225 homes have been sold so far.

— Tabled a request from Elizabeth Bryant of Maricopa to rezone 10 acres from suburban ranch to duplex dwellings to build efficien-



Prudential-Bache Command Account

VIRL M. THORNTON, TRUSTEE
VERA M. THORNTON, TRUSTEE
1520 KEN REY ST. 801-581-0456
SALT LAKE CITY, UT 84108

138

4/29 19 88

25-80
440

Pay to the Order of Fifth Interstate of Arizona $5300.00

Fifteen Thousand Three Hundred and 00/100 Dollars

BANK ONE
BANK ONE, COLUMBUS, NA
Columbus, Ohio 43271

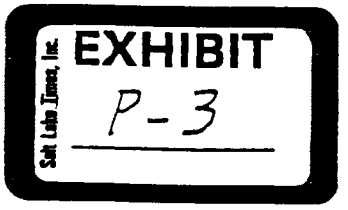
Tax Code Categories
1. Medical/Dental
2. Taxes
3. Interest
4. Contributions
5. Casualty/Theft
6. Misc. Expenses
7. Other

INDICATE TAX CODE (CHECK ONE) 1 2 3 4 5 6 7

Virl W. Thornton

⑆044000804⑆ 433970199⑈ 0138

Red River Mountain Limited Partnership
2855 East Brown Road, Suite 14
Mesa, Arizona 85213
(602) 832-4114



August 29, 1989

BY FAX

Mr. Virl Thornton
c/o Ron Harry
Private Ledger
139 E. South Temple, No. 300
Salt Lake City, Utah 84111

Dear Mr. Thornton:

Pursuant to my conversation with Ron Harry, as General Partner of Red River Mountain Limited Partnership, I hereby consent to the following terms regarding your interests in the above referenced partnership:

1. You will maintain your 3 units in the Partnership and will continue to make the yearly contributions for the 3 units for the years 1989 and 1990 in the amount of $2,885 per unit, per year.

2. After the 1990 payment to the Partnership on your 3 units, you will have no further obligation on these units although you will maintain your interest in the Partnership.

3. These aforementioned items are agreed to providing I receive a check in the amount of $8,655.00 as the 1989 payment on your 3 units by Federal Express, overnight mail, to be received in my office the morning of Friday, September 1, 1989.

Please call me should you have any questions.

Sincerely,

Ross N. Farnsworth, Jr.
General Partner

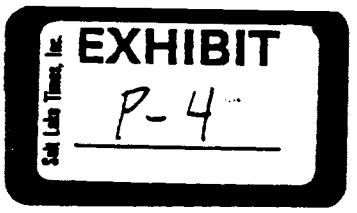
29 ← Check # Thornton Trust 8-29-89

Accepted & Agreed to:

Virl Thornton, Trustee
Virl W. Thornton Trust

FIRST NATIONAL BANK OF ONAGA, KANSAS

301 Leonard, Onaga, KS 66521
913-889-4211



ACCT #41001358 PAGE

SEYMOUR W ISAACS
IRA DTD 04-11-88

TRANSACTION HISTORY
PERIOD ENDING 6/30/88

INDIVIDUAL RETIREMENT ACCOUNT

SEYMOUR W ISAACS
300 EVERGREEN AVE

SUMMIT PARK UT 84060-0000

TRANS. DATE	DESCRIPTION OF TRANSACTION	CASH INCOME WITHHOLDING	CASH PRINCIPAL	INVESTMENTS BOOK VALUE PAR/SHARES/UNIT
4/01/88	BALANCE FORWARD	.00	.00	.00
5/09/88	ROLLOVER CONTRIBUTION		31000.00	
5/10/88	ASSET PURCHASED RED RIVER MOUNTAIN LIMITED PARTNERSHIP		30600.00-	30600.00 6.000000
6/30/88	SAVINGS INTEREST FIRST NATIONAL BANK OF ONAGA IRA CASH ACCOUNT 5.5% INTEREST	3.31		
6/30/88	CUSTODIAL FEE	12.00-		
	NEW BALANCES	.00	.00	30991.31

FIRST NATIONAL BANK OF ONAGA, KANSAS

301 Leonard, Onaga, KS 66521
913-889-4211

ACCT #41001358 PAGE

SEYMOUR W ISAACS
IRA DTD 04-11-88

INVESTMENT REVIEW
AS OF 6/30/88

INDIVIDUAL RETIREMENT ACCOUNT

VALUE/ ES/UNITS	TOTAL COST	TOTAL MARKET	UNIT MARKET	ESTIMATED ANNUAL INCOME	YIELD ON COST	YIELD ON MARKET
REAL ESTATE						
IVER MOUNTAIN LIMITED ERSHIP						
6.000000	30,600.00	.00	.000	.00 *	.00	.00
L REAL ESTATE	30600.00	.00		.00	.00	.00
SAVINGS						
NATIONAL BANK OF ONAGA ASH ACCOUNT INTEREST						
91.310000	391.31	391.31	1.000	21.52	5.50	5.50
L SAVINGS	391.31	391.31		21.52	5.50	5.50
E CASH	.00	.00				
IPAL CASH	.00	.00				
TOTAL	30991.31	391.31		21.52		

FIRST NATIONAL BANK
ONAGA, KANSAS 66521
Phone 913 889-4211

CUSTODIAL IRA TRADING AUTHORIZATION

The undersigned accountholder hereby acknowledges that he/she has retained _____

Ron A Harry
Account Representative of

_____
Firm as Account Representative

for the IRA custodial account referenced below, under the following conditions:

1. Ron A Harry is hereby appointed my Representative with authority to buy, sell and trade in securities for cash for my account in accordance with your terms and conditions to receive duplicated confirmations and statements covering transactions for my account and to do all acts and give orders and instructions necessary or incidental thereto. I hereby confirm all transactions in my account made on my behalf. I indemnify the custodian against any loss sustained as the result of transactions by my agent for my account.

2. My Representative will not place a trade for my account before the initial seven day period after the establishment of my IRA has passed. This will allow for my right to revoke my IRA.

3. This Authorization is not transferable without my consent and may be terminated by written notification from me. I acknowledge responsibility for any transaction initiated prior to receipt of a termination letter.

4. The account will be established as follows:

First National Bank of Onaga Custodian

FBO Seymour W Isaacs, IRA
301 Leonard Street
Onaga, KS 66521
Tax ID No. 48-0974280

Seymour Isaacs
Accountholder's Signature

4/11/88
Date of Acceptance

Account Representative's Signature

139 E So Temple Ste 3C
Rep's Mailing Address

Salt Lake City Utah 84111
City State Zip

801-537-7600
(area code)

Custodian or Trustee: FIRST NATIONAL BANK OF ONAGA

RA Rollover Certification

Accounting

IRA TO IRA ROLLOVER

Please Review The Two Parts Below

PART 1. **TIMELINESS - 60 Days** *The funds you received from the distributing IRA must be deposited within 60 days after you receive them.*
Date you received funds or property from the distributing IRA: 7/1/22

☒ YES ☐ NO Is the date of deposit within 60 days? *If YES, you have met the first requirement, please continue.*

PART 2. **ONE YEAR RESTRICTION** You may make only one IRA rollover every 12 months, per IRA.

Date you received funds or property from the distributing IRA *(date listed under Part 1)*: _____

Date you received your last rollover distribution *(prior to this rollover distribution)* from the distributing IRA: _____

☐ YES ☐ NO Have 12 months or more passed between the above two dates?

☒ Not Applicable *If YES or not applicable, you have met the second requirement. Please read and complete the Signature section below.*

QUALIFIED RETIREMENT PLAN OR TAX SHELTERED ANNUITY TO IRA ROLLOVER

Please Review The Five Parts Below

PART 1. **ELIGIBLE PERSON** To certify you were an eligible participant in a plan, please check one of the items below.
Regarding the plan from which you received the money or property you intend to roll over, are or were you *(check the one that applies)*:

☐ A participant in the plan, ☐ The surviving spouse beneficiary of a deceased participant, or

☐ The alternate payee identified in a Qualified Domestic Relations Order

If you have selected one of the items above, please continue.

PART 2. **ELIGIBLE PLAN** *To certify that your employer maintained the proper kind of plan to allow a rollover to an IRA, please check one or more of the items below.*
The plan from which you received the money or property you intend to roll over was a:

☐ Pension Plan [under IRC §401(a)]

☐ Profit Sharing Plan or Stock Bonus Plan [under IRC §401(a), including IRC §401(k) plan]

☐ Tax Sheltered Annuity [under IRC §403]

Caution: If you are a participant in more than one of the same kind of plan, for example your employer maintained two pension plans, special aggregation rules may apply. You should consult your tax advisor to see if these rules apply to you.
If you have selected one of the above items, please continue.

PART 3. **ELIGIBLE DISTRIBUTION** *Please review each of the distribution options outlined and choose the one that applies to this rollover.*

Option A. ☐ **Partial Distribution** The distribution is a Partial Distribution if the following requirements are met:
1. a. The distribution is at least 50% of the balance to the credit of your account determined immediately before the distribution.
   b. The distribution was made because of the participant's separation from service, death, or disability. AND
   c. You are electing to treat this as a partial distribution rollover *[under IRC §402(a)(5)(D)]*. OR
2. The special Employee Stock Ownership Plan rule in IRC §401(a)(28)(B)(ii) applies.

Option B. ☐ **Qualified Total Distribution** This distribution is a Qualified Total Distribution if the following requirements are met:
1. You received (or will receive) the entire balance to the credit of your account in one tax year. *(Note that the entire balance of all tax sheltered annuities purchased while you worked for your Employer must be paid to you in one tax year.)* AND
2. You have received the distribution because of one of the following reasons *(please check)*:

   ☐ The participant's death. ☐ Attainment of age 59½.

   ☐ Termination of employment or separation from service. *This does not apply to self-employed individuals.*

   ☐ Disability *[as defined in IRC §72(m)(7)]*. *This only applies to self-employed individuals.*

   ☐ The plan was terminated. *This does not apply to tax sheltered annuities [IRC §403].*

Caution About Commingling of Funds: If the distribution you received fits this category and you roll the funds over to an IRA and mix regular payments or funds from other sources, you will not be able to roll the funds back to another qualified retirement plan or tax sheltered annuity.

Option C. ☐ **Distribution Of Voluntary Deductible Employee Contributions** This is a rollover that consists only of accumulated voluntary deductible employee contributions *[as defined in IRC §72(o)(5)(B)]*.

Option D. ☐ **Qualified Domestic Relations Order Distribution** This is a rollover that consists of funds or property received from a qualified pension or profit sharing plan pursuant to a Qualified Domestic Relations Order *[as defined in IRC §414(p)]*.
If so, please provide the Custodian or Trustee with a copy of the relevant portions of the Qualified Domestic Relations Order.
If you have checked one of the four options listed above, please continue.

PART 4. **ELIGIBLE DEPOSIT**

☐ YES ☐ NO Does the rollover deposit consist only of the amount of cash or the property distributed, or the proceeds from the sale of the distributed property?

☐ YES ☐ NO Does the rollover deposit consist only of Employer contributions, Voluntary Deductible Employee Contributions, tax deferred earnings, or any combination thereof?

If YES to both of the above items, please continue.

PART 5. **TIMELINESS - 60 Days** *The funds or property you received must be deposited into an IRA within 60 days after you received them.*
Date You Received the Plan Funds or Property: _____

☐ YES ☐ NO Is the date of this deposit within 60 days? *If YES, you have met the last of the five requirements for making a qualified retirement plan or tax sheltered annuity to IRA rollover. Please read and complete the Signature section below.*

SIGNATURE

Please Read And Complete

Due to the important tax consequences relating to rolling over funds to an IRA, I have been advised to see a tax professional. I certify that I satisfy the requirements for making a rollover into my IRA of $ _____ in cash; and other property with a value of $ _____. I hereby irrevocably designate that this contribution is to be treated as a rollover contribution. The Custodian or Trustee is entitled to rely fully on my certification. I expressly assume the responsibility for any adverse consequences relating

Address
City/State/Zip Code ONAGA, KANSAS 66521
County/Phone (913) 889-4211

IRA SIMPLIFIER

INDIVIDUAL RETIREMENT ACCOUNT APPLICATION

ACCOUNTHOLDER INFORMATION

Check here if this is an amendment to an existing IRA ☐ Amendment

ACCOUNT NO. 41DD 1358 DATE
DEPOSIT AMOUNT $ MADE FOR TAX YEAR 19

Type of IRA Contribution:
☐ Regular
☐ Spousal
☐ SEP
☒ Rollover
☐ Transfer

NAME SEYMOUR W. ISAACS
HOME ADDRESS 300 EVERGREEN AVE
CITY SUMMIT PARK
STATE UTAH ZIP CODE 84060
HOME PHONE (801) 649-9709 BUSINESS PHONE ( )
SOCIAL SECURITY NO. 087-18-2854 DATE OF BIRTH 1/5/24

DESIGNATION OF BENEFICIARY(IES)

I designate the individual(s) named below as my primary and contingent Beneficiary(ies) of this IRA. I revoke all prior IRA Beneficiary designations, if any, made by me. I understand that I may change or add Beneficiaries at any time by completing and delivering the proper form to the Custodian.

If any primary or contingent Beneficiary dies before me, his or her interest and the interest of his or her heirs shall terminate completely, and the percentage share of any remaining Beneficiary(ies) shall be increased on a pro rata basis.

Primary Beneficiary(ies)

The following individual(s) shall be my Primary Beneficiary(ies):

NAME CLAUDIA S. ISAACS SOCIAL SECURITY NO.
ADDRESS DATE OF BIRTH SHARE 100 %
RELATIONSHIP SPOUSE

NAME SOCIAL SECURITY NO.
ADDRESS DATE OF BIRTH SHARE %
RELATIONSHIP

NAME SOCIAL SECURITY NO.
ADDRESS DATE OF BIRTH SHARE %
RELATIONSHIP

Contingent Beneficiary(ies)

If none of the Primary Beneficiaries survive me, the following individual(s) shall be my Beneficiary(ies):

NAME SOCIAL SECURITY NO.
ADDRESS DATE OF BIRTH SHARE %
RELATIONSHIP

NAME SOCIAL SECURITY NO.
ADDRESS DATE OF BIRTH SHARE %
RELATIONSHIP

Spousal Consent

I am the spouse of the IRA accountholder named above. I agree to my spouse's naming of a primary Beneficiary other than myself. I acknowledge that I have received a fair and reasonable disclosure of my spouse's property and financial obligations. I also acknowledge that I shall have no claim whatsoever against the Custodian for any payment to my spouse's named Beneficiary(ies).

SPOUSE'S SIGNATURE DATE

SIGNATURES

Important: Please read before signing.

I understand the eligibility requirements for the type of IRA deposit I am making and I state that I do qualify to make the deposit. I have received a copy of the Application, 5305-A Plan Agreement and Disclosure Statement. I understand that the terms and conditions which apply to this Individual Retirement Account are contained in this Application and the 5305-A Plan Agreement. I agree to be bound by those terms and conditions. Within seven (7) days from the date I open this IRA I may revoke it without penalty by mailing or delivering a written notice to the Custodian.

I assume complete responsibility for:
1. Determining that I am eligible for an IRA each year I make a contribution.
2. Insuring that all contributions I make are within the limits set forth by the tax laws.
3. The tax consequences of any contribution (including rollover contributions) and distributions.

I expressly certify that I take complete responsibility for the type of investment instrument(s) I choose to fund my IRA, and that the Custodian is relieved of any liability regarding the performance of any investment choice I make.

ACCOUNTHOLDER DATE 4/1-88

WITNESS First National Bank of Onaga Cust. DATE 4/11/88

CUSTODIAN OR TRUSTEE ... FIRST NATIONAL ...

RA Rollover Certification

ACCOUNT HOLDER ...

TO IRA ROLLOVER — *Please Review The Two Parts Below*

PART 1. **TIMELINESS - 60 Days** *The funds you received from the distributing IRA must be deposited within 60 days after you receive them.*
Date you received funds or property from the distributing IRA: 5/8/84

☒ YES ☐ NO Is the date of deposit within 60 days? *If YES, you have met the first requirement, please continue.*

PART 2. **ONE YEAR RESTRICTION** You may make only one IRA rollover every 12 months, per IRA.
Date you received funds or property from the distributing IRA *(date listed under Part 1)*: ...

Date you received your last rollover distribution *(prior to this rollover distribution)* from the distributing IRA: ...

☐ YES ☐ NO Have 12 months or more passed between the above two dates?

☒ Not Applicable *If YES or not applicable, you have met the second requirement. Please read and complete the Signature section below.*

QUALIFIED RETIREMENT PLAN OR TAX SHELTERED ANNUITY TO IRA ROLLOVER — *Please Review The Five Parts Below*

PART 1. **ELIGIBLE PERSON** To certify you were an eligible participant in a plan, please check one of the items below. Regarding the plan from which you received the money or property you intend to roll over, are or were you *(check the one that applies)*:

☐ A participant in the plan, ☐ The surviving spouse beneficiary of a deceased participant, or

☐ The alternate payee identified in a Qualified Domestic Relations Order
If you have selected one of the items above, please continue.

PART 2. **ELIGIBLE PLAN** *To certify that your employer maintained the proper kind of plan to allow a rollover to an IRA, please check one or more of the items below.*
The plan from which you received the money or property you intend to roll over was a:

☐ Pension Plan [under IRC §401(a)]

☐ Profit Sharing Plan or Stock Bonus Plan [under IRC §401(a), including IRC §401(k) plan]

☐ Tax Sheltered Annuity [under IRC §403]

Caution: If you are a participant in more than one of the same kind of plan, for example your employer maintained two pension plans, special aggregation rules may apply. You should consult your tax advisor to see if these rules apply to you.
If you have selected one of the above items, please continue.

PART 3. **ELIGIBLE DISTRIBUTION** *Please review each of the distribution options outlined and choose the one that applies to this rollover.*

Option A. ☐ **Partial Distribution** The distribution is a Partial Distribution if the following requirements are met:
1. a. The distribution is at least 50% of the balance to the credit of your account determined immediately before the distribution.
   b. The distribution was made because of the participant's separation from service, death, or disability. AND
   c. You are electing to treat this as a partial distribution rollover *(under IRC §402(a)(5)(D))*. OR
2. The special Employee Stock Ownership Plan rule in IRC §401(a)(28)(B)(ii) applies.

Option B. ☐ **Qualified Total Distribution** This distribution is a Qualified Total Distribution if the following requirements are met:
1. You received (or will receive) the entire balance to the credit of your account in one tax year. *(Note that the entire balance of all tax sheltered annuities purchased while you worked for your Employer must be paid to you in one tax year.)* AND
2. You have received the distribution because of one of the following reasons *(please check)*:

   ☐ The participant's death. ☐ Attainment of age 59½.

   ☐ Termination of employment or separation from service. *This does not apply to self-employed individuals.*

   ☐ Disability *(as defined in IRC §72(m)(7))*. *This only applies to self-employed individuals.*

   ☐ The plan was terminated. *This does not apply to tax sheltered annuities (IRC §403).*

Caution About Commingling of Funds: If the distribution you received fits this category and you roll the funds over to an IRA and mix regular payments or funds from other sources, you will not be able to roll the funds back to another qualified retirement plan or tax sheltered annuity.

Option C. ☐ **Distribution Of Voluntary Deductible Employee Contributions** This is a rollover that consists only of accumulated voluntary deductible employee contributions *(as defined in IRC §72(o)(5)(B))*.

Option D. ☐ **Qualified Domestic Relations Order Distribution** This is a rollover that consists of funds or property received from a qualified pension or profit sharing plan pursuant to a Qualified Domestic Relations Order *(as defined in IRC §414(p))*.
If so, please provide the Custodian or Trustee with a copy of the relevant portions of the Qualified Domestic Relations Order.
If you have checked one of the four options listed above, please continue.

PART 4. **ELIGIBLE DEPOSIT**

☐ YES ☐ NO Does the rollover deposit consist only of the amount of cash or the property distributed, or the proceeds from the sale of the distributed property?

☐ YES ☐ NO Does the rollover deposit consist only of Employer contributions, Voluntary Deductible Employee Contributions, tax deferred earnings, or any combination thereof?
If YES to both of the above items, please continue.

PART 5. **TIMELINESS - 60 Days** *The funds or property you received must be deposited into an IRA within 60 days after you received them.*
Date You Received the Plan Funds or Property: ...

☐ YES ☐ NO Is the date of this deposit within 60 days? *If YES, you have met the last of the five requirements for making a qualified retirement plan or tax sheltered annuity to IRA rollover. Please read and complete the Signature section below.*

SIGNATURE — *Please Read And Complete*

Due to the important tax consequences relating to rolling over funds to an IRA, I have been advised to see a tax professional. I certify that I satisfy the requirements for making a rollover into my IRA of $31000 in cash, and other property with a value of $ 31000. I hereby irrevocably designate that this contribution is to be treated as a rollover contribution. The Custodian or Trustee is entitled to rely fully on my certification. I expressly assume the responsibility for any adverse consequences relating ... be responsible for those consequences. If this rollover is

ONAGA, KANSAS 66521
Phone 913 889-4211

CUSTODIAL IRA TRADING AUTHORIZATION

The undersigned accountholder hereby acknowledges that he/she has retained _____

Ron A Harry
Account Representative

_____ of

_____ as Account Representative
Firm

for the IRA custodial account referenced below, under the following conditions:

1. Ron A Harry is hereby appointed my Representative with authority to buy, sell and trade in securities for cash for my account in accordance with your terms and conditions to receive duplicated confirmations and statements covering transactions for my account and to do all acts and give orders and instructions necessary or incidental thereto. I hereby confirm all transactions in my account made on my behalf. I indemnify the custodian against any loss sustained as the result of transactions by my agent for my account.

2. My Representative will not place a trade for my account before the initial seven day period after the establishment of my IRA has passed. This will allow for my right to revoke my IRA.

3. This Authorization is not transferable without my consent and may be terminated by written notification from me. I acknowledge responsibility for any transaction initiated prior to receipt of a termination letter.

4. The account will be established as follows:

First National Bank of Onaga Custodian

FBO Seymour W Isaace, IRA
301 Leonard Street
Onaga, KS 66521
Tax ID No. 48-0974280

Seymour Isaacs
Accountholder's Signature

4/11/88
Date of Acceptance

Account Representative's Signature

139 E So Temple Ste 300
Rep's Mailing Address

Salt Lake City Utah 84111
City State Zip

801-537-7600
Telephone (area code)

6 units

(c) Estimated adjusted gross income during current year:

_____ Less than $50,000
_____ $ 50,000 - $100,000
_____ $100,000 - $200,000
_____ $200,000 - $300,000
_____ $300,000 - $400,000
_____ over $400,000

(d) Estimated highest tax rate at which federal income taxes will be paid during the current year (without giving effect to an investment in the Partnership) will be twenty-eight percent (28%) (thirty-four percent (34%) for corporations):

_____ yes _____ no

8. NET WORTH.

(a) Current net worth is not less than: $_____

(b) Current net worth (exclusive of home, home furnishings and automobiles) is not less than: $_____.

(c) The current value of my liquid assets (cash, freely marketable securities, cash surrender value of life insurance and other items easily convertible into cash) is sufficient to provide for my current needs and possible personal contingencies:

_____ yes _____ no

B. THE FOLLOWING INFORMATION IS TO BE PROVIDED BY OFFEREES WHO ARE INDIVIDUALS, OR BY THE PERSON MAKING THE INVESTMENT DECISION ON BEHALF OF CORPORATIONS, PARTNERSHIPS, TRUSTS OR OTHER ENTITIES.

1. Name: FIRST NATIONAL BANK OF ONAGA C/F Seymour W. Isaacs

Business Address: 201 Leonard Street
ONAGA, KANSAS 66521
Phone (913) 889-4211

Business Telephone Number: (_____) _____

2. (a) Current Occupation or Profession: _____

(b) Current Position or Title: _____

(c) Nature of Duties: _____

(d) Period Employed: _____

3. Business or professional education:

School or License	Field of Study	Dates of Attendance	Degree (if any)

4. Prior employment, positions, business affiliations or occupations: (Please set forth employment history during at least the past five years, indicating employer, title, principal responsibilities and years of service.)

5. Details of any training or experience in financial or business matters not disclosed in Items 3 and 4:

6. I have made the following investments which reflect my knowledge and experience in financial and business matters:

7. I have previously purchased securities which were sold in reliance on the limited offering or private offering exemptions from registration under the Act and state securities laws:

_____ yes _____ no

C. PURCHASER REPRESENTATIVE. Does the purchaser intend to use

FOR EXECUTION BY INDIVIDUAL OFFEREES

_____ _____
Signature(s) of Prospective Investor(s) Please Print Name

_____ _____
Signature(s) of Prospective Investor(s) Please Print Name

Executed at _____, _____
(City) (State)

on this ____ day of _____, 19___.

FOR EXECUTION BY CORPORATE,
PARTNERSHIP OR TRUST OFFEREE

FIRST NATIONAL BANK OF ONAGA C/F Seymour W. Isaacs, IRA #410135.
301 Leonard Street
ONAGA, KANSAS 66521
Phone (913) 889-4211

Name of Corporation, Partnership or Trust (Please Print)
First National Bank of Onaga

By: By: Anita B. Schafer, IRA Officer

Title:

By: _____

Title: _____

Signature of person(s) making investment decision on behalf of the entity.

_____

Executed at ONAGA (City), KS (State),
on this 9th day of May, 1988.

56.QUE_RED.79

LIMITED PARTNER'S SIGNATURE PAGE
FOR TRUST INVESTORS
FOR THE
LIMITED PARTNERSHIP AGREEMENT OF
RED RIVER MOUNTAIN LIMITED PARTNERSHIP,
CERTIFICATE OF LIMITED PARTNERSHIP
OF
RED RIVER MOUNTAIN LIMITED PARTNERSHIP
AND
SUBSCRIPTION AGREEMENT

By execution of this signature page, the undersigned intends to subscribe for and, upon acceptance by the General Partners, to become a Limited Partner in RED RIVER MOUNTAIN LIMITED PARTNERSHIP, an Arizona limited partnership. The undersigned intends that this signature page be attached to the master copies of the Subscription Agreement, the LIMITED PARTNERSHIP AGREEMENT OF RED RIVER, MOUNTAIN LIMITED PARTNERSHIP, and the Certificate of Limited Partnership of RED RIVER MOUNTAIN LIMITED PARTNERSHIP, which may be filed by the General Partners in order to evidence the admission of the undersigned as a Limited Partner of the Partnership. Said master copies shall be kept in the central files of the Partnership, together with the signature pages executed by all other Limited Partners, and the master copies, together with the attached signature pages, shall each become fully signed documents with the same effect as if all parties had signed the same document.

First National Bank of Onaga C/F
Name of Trust (please print or type)

Seymour W. Isaacs, IRA #41001358
Name of Trustee (please print or type)

4-11-88
Date Trust was formed

By: First National Bank of Onaga
By Anita B. Schafer, IRA Officer
Trustee's signature

Trust Address: 301 Leonard St
Onaga, KS 66521

Attention: Anita or Jean

EXECUTED at Onaga (City), KS (State), this 9th day of May, 1989.

STATE OF KS)
) ss.
County of Pottawatomie)

On this, the 9th day of May, 1989, before me, the undersigned, a Notary Public of said state, duly commissioned and sworn, personally appeared Anita L. Schafer IRA OFFICER, known to me to be Trustee of the trust that executed the within instrument, and acknowledged that he and the said trust were duly authorized to, and did, execute the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL CATHERINE E. WARD State of Kansas My Appt. Exp. April 26, 1992

Notary Public in and for said State

My Commission Expires:

April 26, 1992

ACCEPTANCE OF SUBSCRIPTION:

RED RIVER MOUNTAIN LIMITED PARTNERSHIP, an Arizona limited partnership

By: _____
Ross N. Farnsworth, Jr.
Its General Partner

Date: 9/20/88

By: _____
Craig B. Cannon
Its General Partner

Date: 9/26/88

56.SUB_RED.81

Red River Mountain Limited Partnership
2855 East Brown Road, Suite 14
Mesa, Arizona 85213
(602) 832-4114

March 15, 1989

Seymour Isaacs Trust
300 Evergreen Drive
Summit Park, UT 84060

Dear Seymour:

As you are aware, according to the Offering Memorandum, the first annual payment on Red River Mountain Limited Partnership is due and payable on April 25, 1989. Therefore, we are requesting your contribution be in our office no later than April 15, 1989 in order to have all checks clear the bank prior to the payment due date.

Your check should be made payable to Red River Mountain Limited Partnership and sent to:

Red River Mountain Limited Partnership
2855 E. Brown Road, Suite 14
Mesa, Arizona 85203

You own 6 units so the total amount you need to send is $17,310.00. Please be sure to send it no later than April 15, 1989.

If you have any questions please don't hesitate to call. It's a pleasure to have you as part of this project.

Sincerely,

Ross Farnsworth, Jr. Cregg Cannon

RF:FB/paz

ST NATIONAL BANK
OF ONAGA, KANSAS
301 Leonard, Onaga, KS 66521
913-889-4211

ACCT #41001357 PAGE

FRANK BRGOCH
IRA DTD 04-04-88

TRANSACTION HISTORY
PERIOD ENDING 6/30/88

INDIVIDUAL RETIREMENT ACCOUNT

NK BRGOCH
) SO 150DE

NTIFUL UT 84010-0000

	DESCRIPTION OF TRANSACTION	CASH INCOME WITHHOLDING	CASH PRINCIPAL	INVESTMENTS BOOK VALUE PAR/SHARES/UNITS
'88	BALANCE FORWARD	.00	.00	.00
'88	ROLLOVER CONTRIBUTION		30700.00	
'88	ASSET PURCHASED RED RIVER MOUNTAIN LIMITED PARTNERSHIP		30600.00-	30600.00 6.000000
'88	SAVINGS INTEREST FIRST NATIONAL BANK OF ONAGA IRA CASH ACCOUNT 5.5% INTEREST	.83		
'88	CUSTODIAL FEE	12.00-		
	NEW BALANCES	.00	.00	30683.83

EXHIBIT
D 7

Phone 918 889-4211

02700001

EXHIBIT
Salt Lake Tribune, Inc.
P - 8

CUSTODIAL IRA TRADING AUTHORIZATION

The undersigned accountholder hereby acknowledges that he/she has retained _____ of

Ron A Harry
Account Representative

_____ as Account Representative
Firm

for the IRA custodial account referenced below, under the following conditions:

1. Ron A Harry is hereby appointed my Representative with authority to buy, sell and trade in securities for cash for my account in accordance with your terms and conditions to receive duplicated confirmations and statements covering transactions for my account and to do all acts and give orders and instructions necessary or incidental thereto. I hereby confirm all transactions in my account made on my behalf. I indemnify the custodian against any loss sustained as the result of transactions by my agent for my account.

2. My Representative will not place a trade for my account before the initial seven day period after the establishment of my IRA has passed. This will allow for my right to revoke my IRA.

3. This Authorization is not transferable without my consent and may be terminated by written notification from me. I acknowledge responsibility for any transaction initiated prior to receipt of a termination letter.

4. The account will be established as follows:

First National Bank of Onaga Custodian

PBO Frank Brgoch IRA
301 Leonard Street
Onaga, KS 66521
Tax ID No. 48-0974280

Frank Brgoch
Accountholder's Signature

4/11/86
Date of Acceptance

Account Representative's Signature

139 E So. Temple Ste 3000
Rep's Mailing Address

Salt Lake City Utah 84111
City State Zip

801-537-7600
Telephone (area code)

County/Town _____ (918) 599-4211 02700002

IRA SIMPLIFIER

INDIVIDUAL RETIREMENT ACCOUNT APPLICATION

ACCOUNTHOLDER INFORMATION

Check here if this is an amendment to an existing IRA ☐ Amendment

ACCOUNT NO 41 00 1357 DATE _____

DEPOSIT AMOUNT: $ 30,700 MADE FOR TAX YEAR 19 _____

Type of IRA Contribution:
- ☐ Regular
- ☐ Spousal
- ☐ SEP
- ☒ Rollover
- ☐ Transfer

NAME FRANK BRAUCH

HOME ADDRESS 1580 So 1500E

CITY BOUNTIFUL, UTAH 84010

STATE _____ ZIP CODE _____

HOME PHONE (801) 295-1895 BUSINESS PHONE ( ) _____

SOCIAL SECURITY NO. 534-24-5180 DATE OF BIRTH 12/16/24

DESIGNATION OF BENEFICIARY(IES)

I designate the individual(s) named below as my primary and contingent Beneficiary(ies) of this IRA. I revoke all prior IRA Beneficiary designations, if any, made by me. I understand that I may change or add Beneficiaries at any time by completing and delivering the proper form to the Custodian.

If any primary or contingent Beneficiary dies before me, his or her interest and the interest of his or her heirs shall terminate completely, and the percentage share of any remaining Beneficiary(ies) shall be increased on a pro rata basis.

Primary Beneficiary(ies)

The following individual(s) shall be my Primary Beneficiary(ies):

NAME ELLEN J. BRAUCH SOCIAL SECURITY NO. 532-26-4904

ADDRESS 1580 So. 1500E. DATE OF BIRTH 10/20/30 SHARE 100

BOUNTIFUL, Ut. 84010 RELATIONSHIP SPOUSE

NAME _____ SOCIAL SECURITY NO. _____

ADDRESS _____ DATE OF BIRTH _____ SHARE _____

RELATIONSHIP _____

NAME _____ SOCIAL SECURITY NO. _____

ADDRESS _____ DATE OF BIRTH _____ SHARE _____

RELATIONSHIP _____

Contingent Beneficiary(ies)

If none of the Primary Beneficiaries survive me, the following individual(s) shall be my Beneficiary(ies).

NAME ESTATE SOCIAL SECURITY NO. _____

ADDRESS _____ DATE OF BIRTH _____ SHARE _____

RELATIONSHIP _____

NAME _____ SOCIAL SECURITY NO. _____

ADDRESS _____ DATE OF BIRTH _____ SHARE _____

RELATIONSHIP _____

Spousal Consent

I am the spouse of the IRA accountholder named above. I agree to my spouse's naming of a primary Beneficiary other than myself. I acknowledge that I have received a fair and reasonable disclosure of my spouse's property and financial obligations. I also acknowledge that I shall have no claim whatsoever against the Custodian for any payment to my spouse's named Beneficiary(ies).

SPOUSE'S SIGNATURE _____ DATE _____

SIGNATURES

Important: Please read before signing.

I understand the eligibility requirements for the type of IRA deposit I am making and I state that I do qualify to make the deposit. I have received a copy of the Application, 5305-A Plan Agreement and Disclosure Statement. I understand that the terms and conditions which apply to this Individual Retirement Account are contained in this Application and the 5305-A Plan Agreement. I agree to be bound by those terms and conditions. Within seven (7) days from the date I open this IRA I may revoke it without penalty by mailing or delivering a written notice to the Custodian.

I assume complete responsibility for:
1. Determining that I am eligible for an IRA each year I make a contribution.
2. Insuring that all contributions I make are within the limits set forth by the tax laws.
3. The tax consequences of any contribution (including rollover contributions) and distributions.

I expressly certify that I take complete responsibility for the type of investment instrument(s) I choose to fund my IRA, and that the Custodian is released of any liability regarding the performance of any investment choice I make.

ACCOUNTHOLDER Frank E. Brauch DATE 4/4/84

WITNESS First National Bank of Omaha DATE 4/4/84

KA Rollover Certification

ACCUTRUSTER

TO IRA ROLLOVER

Please Review The Two Parts Below

PART 1. **TIMELINESS - 60 Days** *The funds you received from the distributing IRA must be deposited within 60 days after you receive them.*

Date you received funds or property from the distributing IRA: _____

☒ YES ☐ NO Is the date of deposit within 60 days? *If YES, you have met the first requirement, please continue.*

PART 2. **ONE YEAR RESTRICTION** You may make only one IRA rollover every 12 months, per IRA.

Date you received funds or property from the distributing IRA *(date listed under Part 1)*: _____

Date you received your last rollover distribution *(prior to this rollover distribution)* from the distributing IRA: _____

☒ YES ☐ NO Have 12 months or more passed between the above two dates?

☒ Not Applicable *If YES or not applicable, you have met the second requirement. Please read and complete the Signature section below.*

QUALIFIED RETIREMENT PLAN OR TAX SHELTERED ANNUITY TO IRA ROLLOVER

Please Review The Two Parts Below

PART 1. **ELIGIBLE PERSON** To certify you were an eligible participant in a plan, please check one of the items below. Regarding the plan from which you received the money or property you intend to roll over, are or were you *(check the one that applies)*:

☐ A participant in the plan. ☐ The surviving spouse beneficiary of a deceased participant, or

☐ The alternate payee identified in a Qualified Domestic Relations Order

If you have selected one of the items above, please continue.

PART 2. **ELIGIBLE PLAN** *To certify that your employer maintained the proper kind of plan to allow a rollover to an IRA, please check one or more of the items below.*

The plan from which you received the money or property you intend to roll over was a:

☐ Pension Plan [under IRC §401(a)]

☐ Profit Sharing Plan or Stock Bonus Plan [under IRC §401(a), including IRC §401(k) plan]

☐ Tax Sheltered Annuity [under IRC §403]

Caution: If you are a participant in more than one of the same kind of plan, for example your employer maintained two pension plans, special aggregation rules may apply. You should consult your tax advisor to see if these rules apply to you.

If you have selected one of the above items, please continue.

PART 3. **ELIGIBLE DISTRIBUTION** *Please review each of the distribution options outlined and choose the one that applies to this rollover.*

Option A. ☐ **Partial Distribution** The distribution is a Partial Distribution if the following requirements are met:

1. a. The distribution is at least 50% of the balance to the credit of your account determined immediately before the distribution.
   b. The distribution was made because of the participant's separation from service, death, or disability, AND
   c. You are electing to treat this as a partial distribution rollover *[under IRC §402(a)(5)(D)]*. OR
2. The special Employee Stock Ownership Plan rule in IRC §401(a)(28)(B)(ii) applies.

Option B. ☐ **Qualified Total Distribution** This distribution is a Qualified Total Distribution if the following requirements are met:

1. You received (or will receive) the entire balance to the credit of your account in one tax year. *(Note that the entire balance of all tax sheltered annuities purchased while you worked for your Employer must be paid to you in one tax year.)* AND
2. You have received the distribution because of one of the following reasons *(please check)*:

   ☐ The participant's death. ☐ Attainment of age 59½.

   ☐ Termination of employment or separation from service. *This does not apply to self-employed individuals.*

   ☐ Disability *(as defined in IRC §72(m)(7))*. *This only applies to self-employed individuals.*

   ☐ The plan was terminated. *This does not apply to tax sheltered annuities [IRC §403].*

Caution About Commingling of Funds: If the distribution you received fits this category and you roll the funds over to an IRA and mix regular payments or funds from other sources, you will not be able to roll the funds back to another qualified retirement plan or tax sheltered annuity.

Option C. ☐ **Distribution Of Voluntary Deductible Employee Contributions** This is a rollover that consists only of accumulated voluntary deductible employee contributions *(as defined in IRC §72(o)(5)(B))*.

Option D. ☐ **Qualified Domestic Relations Order Distribution** This is a rollover that consists of funds or property received from a qualified pension or profit sharing plan pursuant to a Qualified Domestic Relations Order *(as defined in IRC §414(p))*. If so, please provide the Custodian or Trustee with a copy of the relevant portions of the Qualified Domestic Relations Order.

If you have checked one of the four options listed above, please continue.

PART 4. **ELIGIBLE DEPOSIT**

☐ YES ☐ NO Does the rollover deposit consist only of the amount of cash or the property distributed, or the proceeds from the sale of the distributed property?

☐ YES ☐ NO Does the rollover deposit consist only of Employer contributions, Voluntary Deductible Employee Contributions, tax deferred earnings, or any combination thereof?

If YES to both of the above items, please continue.

PART 5. **TIMELINESS - 60 Days** *The funds or property you received must be deposited into an IRA within 60 days after you received them.*

Date You Received the Plan Funds or Property: _____

☐ YES ☐ NO Is the date of this deposit within 60 days? *If YES, you have met the last of the five requirements for making a qualified retirement plan or tax sheltered annuity to IRA rollover. Please read and complete the Signature section below.*

SIGNATURE

Please Read And Complete

Due to the important tax consequences relating to rolling over funds to an IRA, I have been advised to see a tax professional. I certify that I satisfy the requirements for making a rollover into my IRA of $ 30,700 in cash and other property with a value of $ 30,700 . I hereby irrevocably designate that this contribution is to be treated as a rollover contribution. The Custodian or Trustee is entitled to rely fully on my certification. I expressly assume the responsibility for any adverse consequences relating to this rollover contribution and I agree that the Custodian or Trustee shall in no way be responsible for those consequences. If this rollover is being made during or after the year in which I turn 70½, I certify that I have satisfied the requirements of Treasury Regulation §1.401(a)(9)-1C.

Date 8/18/17

0270003

(c) Estimated adjusted gross income during current year:

_____ Less than $50,000	_____ $200,000 - $300,000
_____ $ 50,000 - $100,000	_____ $300,000 - $400,000
_____ $100,000 - $200,000	_____ over $400,000

(d) Estimated highest tax rate at which federal income taxes will be paid during the current year (without giving effect to an investment in the Partnership) will be twenty-eight percent (28%) (thirty-four percent (34%) for corporations):

_____ yes _____ no

8. NET WORTH.

(a) Current net worth is not less than: $_____

(b) Current net worth (exclusive of home, home furnishings and automobiles) is not less than: $_____.

(c) The current value of my liquid assets (cash, freely marketable securities, cash surrender value of life insurance and other items easily convertible into cash) is sufficient to provide for my current needs and possible personal contingencies:

_____ yes _____ no

B. THE FOLLOWING INFORMATION IS TO BE PROVIDED BY OFFEREES WHO ARE INDIVIDUALS, OR BY THE PERSON MAKING THE INVESTMENT DECISION ON BEHALF OF CORPORATIONS, PARTNERSHIPS, TRUSTS OR OTHER ENTITIES.

1. Name: _____

Business Address: FIRST NATIONAL BANK OF ONAGA 301 Leonard Street ONAGA, KANSAS 66521 Phone (913) 889-4211 C/F Frank Rausch, IRA # 41001857

Business Telephone Number: (_____) _____

2. (a) Current Occupation or Profession: IRA Custodian

(b) Current Position or Title: _____

(c) Nature of Duties: _____

(d) Period Employed: _____

3. Business or professional education:

School or License	Field of Study	Dates of Attendance	Degree (if any)

4. Prior employment, positions, business affiliations or occupations: (Please set forth employment history during at least the past five years, indicating employer, title, principal responsibilities and years of service.)

5. Details of any training or experience in financial or business matters not disclosed in Items 3 and 4:

6. I have made the following investments which reflect my knowledge and experience in financial and business matters:

7. I have previously purchased securities which were sold in reliance on the limited offering or private offering exemptions from registration under the Act and state securities laws:

_____ yes _____ no

C. PURCHASER REPRESENTATIVE. Does the purchaser intend to use

FOR EXECUTION BY INDIVIDUAL OFFEREES

_____ _____

Signature(s) of Prospective Investor(s) Please Print Name

_____ _____

Signature(s) of Prospective Investor(s) Please Print Name

Executed at _____, _____,
(City) (State)

on this _____ day of _____, 19___.

02700007

FOR EXECUTION BY CORPORATE,
PARTNERSHIP OR TRUST OFFEREE

FIRST NATIONAL BANK OF ONAGA C/F Bank Branch, IRA # 4100185

301 Leonard Street
ONAGA, KANSAS 66521
Phone (913) 889-4211

Name of Corporation, Partnership or Trust (Please Print)

First National Bank of Onaga

By: By Anita B Schafer, IRA Officer

Title:

By:

Title:

Signature of person(s) making investment decision on behalf of the entity.

Executed at ONAGA (City), KS (State),

on this 9th day of May, 1988.

56.QUE_RED.79

FOR TRUST INVESTORS
FOR THE
LIMITED PARTNERSHIP AGREEMENT OF
RED RIVER MOUNTAIN LIMITED PARTNERSHIP,
CERTIFICATE OF LIMITED PARTNERSHIP
OF
RED RIVER MOUNTAIN LIMITED PARTNERSHIP
AND
SUBSCRIPTION AGREEMENT

By execution of this signature page, the undersigned intends to subscribe for and, upon acceptance by the General Partners, to become a Limited Partner in RED RIVER MOUNTAIN LIMITED PARTNERSHIP, an Arizona limited partnership. The undersigned intends that this signature page be attached to the master copies of the Subscription Agreement, the LIMITED PARTNERSHIP AGREEMENT OF RED RIVER MOUNTAIN LIMITED PARTNERSHIP, and the Certificate of Limited Partnership of RED RIVER MOUNTAIN LIMITED PARTNERSHIP, which may be filed by the General Partners in order to evidence the admission of the undersigned as a Limited Partner of the Partnership. Said master copies shall be kept in the central files of the Partnership, together with the signature pages executed by all other Limited Partners, and the master copies, together with the attached signature pages, shall each become fully signed documents with the same effect as if all parties had signed the same document.

First National Bank of Onaga C/F
Name of Trust (please print or type)

Frank Brgucich IRA # 4100 1357
Name of Trustee (please print or type)

4/4/88
Date Trust was formed

By: First National Bank of Onaga
By: Anita B. Schafer, IRA Officer
Trustee's signature

Trust Address: 301 Leonard St.
Onaga, KS 66521

Attention: Anita or Jean

EXECUTED at Onaga (City), KS (State),
this 9th day of May, 1988.

STATE OF KS)
) ss.
County of Pottawatomie)

On this, the 9th day of May, 1988, before me, the undersigned, a Notary Public of said state, duly commissioned and sworn, personally appeared Austin B. Scholer IRA officer, known to me to be Trustee of the trust that executed the within instrument, and acknowledged that he and the said trust were duly authorized to, and did, execute the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL] CATHERINE E. WARD
State of Kansas
My Appt. Exp. April 26, 1992

Catherine E. Ward
Notary Public in and for said State

My Commission Expires:
April 26, 1992

ACCEPTANCE OF SUBSCRIPTION:

RED RIVER MOUNTAIN LIMITED PARTNERSHIP, an Arizona limited partnership

By: _____
Ross N. Farnsworth, Jr.
Its General Partner

Date: 9/20/88

By: _____
Craig B. Cannon
Its General Partner

Date: 9/28/88

56.SUB_RED.81

FIRST NATIONAL BANK
OF ONAGA, KANSAS 66521.
I.R.A. DEPARTMENT

ONAGA, KANSAS 66521, 5-9 1987

ACCOUNT NO. 4 001357 FDIC

NAME Frank Bigoch

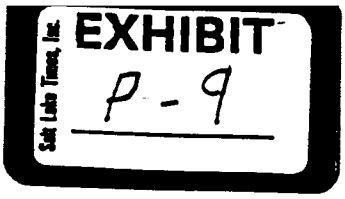
ADDRESS

CITY

COIN		
CURRENCY		
CHECKS		
Rollover		
wire	30700	00
LESS CASH		
TOTAL DEPOSIT		

Checks and other items are received for deposit subject the terms and conditions of this bank's collection agreer

00500006



Red River Mountain Limited Partnership

2855 East Brown Road, Suite 14
Mesa, Arizona 85213
(602) 832-4114

March 15, 1989

Mr. Frank Brgoch
1580 S. 1500 East
Bountiful, UT 84010

Dear Frank:

As you are aware, according to the Offering Memorandum, the first annual payment on Red River Mountain Limited Partnership is due and payable on April 25, 1989. Therefore, we are requesting your contribution be in our office no later than April 15, 1989 in order to have all checks clear the bank prior to the payment due date.

Your check should be made payable to Red River Mountain Limited Partnership and sent to:

Red River Mountain Limited Partnership
2855 East Brown Road, Suite 14
Mesa, Arizona 85203

You own 3 unit(s) so the total amount you need to send is $17,310.00. Please be sure to send it no later than April 15, 1989.

If you have any questions please don't hesitate to call. It's a pleasure to have you as part of this project.

Sincerely,

Ross N. Farnsworth, Jr.

RNF/paz

RESTRICTED -- SEE REVERSE

NUMBER

39

UNITS

3

RED RIVER MOUNTAIN LIMITED PARTNERSHIP

This Certifies that Virl W. Thornton, Trustee,
Virl W. Thornton Trust *is the owner of*

----------THREE---------- *fully paid and non assessable Units of the above Limited Partnership transferable only on the books of the Limited Partnership by the holder hereof in person or by duly authorized Attorney upon surrender of this Certificate properly endorsed.*

In Witness Whereof, the said Limited Partnership has caused this certificate to be signed by its duly authorized Partners.

Dated May 6, 1988

RESTRICTED -- SEE REVERSE

NUMBER

24

UNITS

6

RED RIVER MOUNTAIN LIMITED PARTNERSHIP

This Certifies that First National Bank of Onaga, C/F Seymour W. Isaacs, IRA No. 41001358 *is the owner of*

----------SIX---------- *fully paid and non-assessable Units of the above Limited Partnership transferable only on the books of the Limited Partnership by the holder hereof in person or by duly authorized Attorney upon surrender of this Certificate properly endorsed.*

In Witness Whereof, the said Limited Partnership has caused this certificate to be signed by its duly authorized Partners.

Dated May 9, 1988

Ross N. Farnsworth, Jr.

Craig B. Cannon

RESTRICTED -- SEE REVERSE

NUMBER

22

UNITS

6

RED RIVER MOUNTAIN LIMITED PARTNERSHIP

This Certifies that First National Bank of Onaga, C/F Frank Brgoch, IRA No. 41001357 *is the owner of*

----------SIX----------

fully paid and non-assessable Units of the above Limited Partnership transferable only on the books of the Limited Partnership by the holder hereof in person or by duly authorized Attorney upon surrender of this Certificate properly endorsed.

In Witness Whereof, the said Limited Partnership has caused this certificate to be signed by its duly authorized Partners.

Dated May 9, 1988

Robert Farnsworth, Jr.

Geoff B. Canon

6-0 87

TO Ron Harris

FOR Wall

257-0001 see bac

TAX DEDUCTIBLE ☐

DEPOSITS

TOTAL

THIS CHECK 500 00

OTHER TRANS. +/-

BALANCE 228 76

Talked Kirk - 7/14 Stopped print

2344

6-15 19 89

TO PAZ

FOR Payroll

June

TAX DEDUCTIBLE ☐

DEPOSITS

TOTAL

THIS CHECK ✓ 1087 26

OTHER TRANS. +/-

BALANCE 1728 76

2345

6-15 19 89

TO SEP

FOR Elect

DEPOSITS

TOTAL

THIS CHECK ✓ 112 12

TO Chem-Dry

FOR Office Carpet Cleaning

TAX DEDUCTIBLE ☐

DEPOSITS

TOTAL

THIS CHECK ✓ 10

OTHER TRANS. +/-

BALANCE 49

Bank OK

2308

5-1 19 89

TO Ron Harry

FOR Commission

TAX DEDUCTIBLE ☐

DEPOSITS

TOTAL 5

THIS CHECK 30

OTHER TRANS. +/-

BALANCE 2

2309

5-3 19 89

TO Central Reserve Life

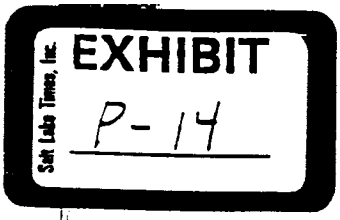
FOR May

DEPOSITS

TOTAL 14

THIS CHECK ✓ 81

5/19/89



PrivateLedger

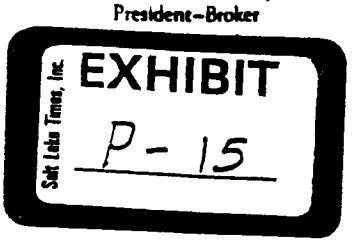
ROSS,

I APPRECIATE THE SITUATION YOU ARE IN RE: RED RIVER, VAL & SCOTT ETC., BUT I CAN'T ACCEPT THE PAYMENT ON A PIECEMEAL BASIS.

Ron.

ARNSWORTH HOLDINGS, INC.

Ross N. Farnsworth Jr.
President-Broker



TELECOPIER COVER SHEET

DATE: 1-16-90

TO: Ron Harris FROM: Ross Farnsworth Jr

FAX NO. (801) 531-8246 FAX NO.: (~~801~~) (602) 844-2909

NUMBER OF PAGES INCLUDING COVER SHEET: 2

TYPE/TITLE OF DOCUMENT: Letter

MESSAGE OR SPECIAL INSTRUCTIONS TO RECIPIENT:

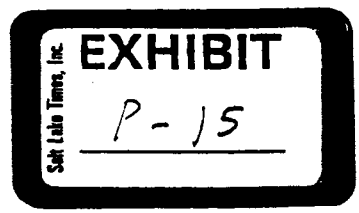
Call as soon as you receive this - Lets get it done.

IF YOU DO NOT ~~RECEIVE~~ ALL OF THE ABOVE PAGES CONTACT:

Pat 834-7400

FARNSWORTH HOLDINGS, INC.

Ross N. Farnsworth Jr.
President–Broker



January 16, 1990

Mr. Ron Harry
c/o Private Ledger
139 East South Temple, No. 300
Salt Lake City, Utah 84111

Dear Ron:

Pursuant to our conversation, I'm submitting the following alternatives for final resolution of the limited partnership situation pertaining to the interests of Frank Brgoch and Seymour Issacs.

1. Mr. Brgoch and Mr. Issacs will each release to the Partnership 4 units of the 6 units they own. In exchange for their release of the 4 units, they will each retain 2 units which will be considered paid in full until disposition of partnership assets. They will have no further obligation to the Partnership but will retain their partnership interest in the two units.

2. Mr. Brgoch and Mr. Issacs will release 3 units of the 6 units they own. In exchange for their release of the 3 units, they will have no annual payments for 5 years (1989, 1990, 1991, 1992, 1993) on their 3 units of partnership interest they will retain. If the partnership property is not sold by the time the 1994 payment is due, Mr. Brgoch and Mr. Issacs will again begin paying the partnership annual payments as indicated in the Private Placement Memorandum.

Ron, as you are aware, the time is drawing near for the annual payment on the partnership and my goal is to have these two releases finalized by January 31. I don't feel this is an unrealistic goal. The alternative is not pleasant.

Please pursue this expeditiously. Thank you for your cooperation.

Sincerely,

Ross N. Farnsworth, Jr.

Private Ledger
A CAPITAL COMPANY

Representative ID # 2636
Office ID # 3709

REPRESENTATIVE AGREEMENT - 90% Commission Schedule

This Agreement is entered into between Private Ledger Financial Services, Inc. ("Private Ledger") and Ronald A. Harry, ("Representative"), who has been accepted as a Registered Representative and agent for the limited purposes set forth below. This agreement is effective January 11, 1988

1. Private Ledger's Obligations. Private Ledger:

(A) Hereby appoints the Representative as its agent to solicit purchases of securities and investments offered through Private Ledger.

(B) Shall pay the Representative 90% of the commissions from transactions generated by him/her as such commissions are set forth in Schedule A attached. Payments hereunder shall be made only with respect to commissions Private Ledger actually receives while Representative is registered with Private Ledger. No payments shall be made to the Representative unless he/she is registered with Private Ledger on the date the commission is received.

(C) Is not obligated to provide any services to Representative (such as clerical assistance, office expense, postage, telephone costs, or other expenses) unless Private Ledger and the Representative agree on such services and Representative pays for such services.

2. The Representative's Obligations. The Representative:

(A) Shall pay all fees per Schedule B attached.

(B) Shall pay each calendar month in advance a Monthly Contract Fee as specified in Schedule B to this Agreement. The fee for the first and last month of the term hereof, if less than a full month, shall be prorated on the basis of a 30 day month.

(C) Shall pay any balance owing to Private Ledger within 10 business days of receipt of Private Ledger's statement unless other arrangements are made in writing with the Controller of Private Ledger.

(D) Shall provide to prospective purchasers a current prospectus or other offering materials when required by the federal and/or state securities laws, shall explain fully the terms of any security or investment offering for sale to a customer, shall make no untrue or misleading statements or representations, shall not omit any material information or facts pertaining to any aspect of the transaction or sale, and shall comply with all laws respecting offers and sales of securities and advising persons on such matters.

EXHIBIT
Tinnus, Inc.
D

(E) Shall pay all expenses of the Representative's business and conduct such business in accordance with the rules and regulations of the Securities and Exchange Commission (SEC), the National Association of Securities Dealers (NASD), the National Futures Association (NFA), the Commodity Futures Trading Commission (CFTC), any state agencies regulating the Representative's activities and the policies of Private Ledger, and shall not conduct business or receive funds until fully licensed as required by such laws.

(F) Shall pay Private Ledger an annual compliance fee in the amount of $ 50.00. This fee is $50 for all Representatives located within 1,000 miles of Private Ledger's principal office, $100 for all Representatives located from 1,000 to 2,000 miles and $150 for all others.

(G) Shall not mail any correspondence, make any communication or cause any advertising to be made respecting investments or the investment business unless said correspondence, communication or advertising is approved in advance by Private Ledger, and the Representative shall provide copies of such correspondence, communication and advertising to Private Ledger in accordance with SEC regulations.

(H) Shall accept payments from customers by check or money order only. All checks shall be made payable to the underwriter, investment company or insurance company designated by Private Ledger in connection with the offering.

(I) Agrees to indemnify Private Ledger and hold it harmless from any loss, cost or liability, including attorney's fees and costs, which result from the Representative's negligence, violation of securities rules or regulations, or other misconduct. Attorney's fees, adverse settlements and/or judgement imposed on the Representative and/or Private Ledger where fault is determined by a court of proper jurisdiction, shall be shared by Private Ledger and the Representative in the same proportion as the commissions on transactions such as the one in dispute were shared.

(J) Agrees to contribute monies, on a basis proportional to his/her earned commissions, to any effort by Private Ledger to recover unpaid (delinquent) commissions from issuer/general partners for the benefit of the Representative.

(K) Shall not act in any manner whatsoever as an agent for any individual or company competitive in any respect with Private Ledger.

(L) Shall represent to all customers and prospective customers, whenever he/she is soliciting purchases or interviewing customers or otherwise, that he/she is acting as a Representative of Private Ledger and that orders for securities will be placed through Private Ledger.

(M) Shall pay all costs of client reneges, failures to comply with margin calls and all other losses resulting from the failure of a client to meet his financial responsibility; and pay all attorney's fees and other fees and costs incurred by Private Ledger in dispute(s) involving the Representative's clients in which the dispute(s) arose from actions by the Representative and not from actions by Private Ledger.

(N) Shall conduct himself/herself and his/her affairs in a professional manner

3. Independent Contractor Relationship.

(A) The Representative shall maintain his/her own offices and conduct his/her business in such manner as he/she shall see fit, consistent with all regulatory requirements and his/her obligations hereunder. The Representative is an agent only, and has no authority to bind Private Ledger in any way except to communicate to clients materials supplied by Private Ledger and to accept purchases of securities offered through Private Ledger.

(B) For the purposes of the Federal Insurance Contributions Act, the Federal Unemployment Contributions Act, and the laws respecting the collection of state and federal income tax at the source of wages, the relationship between Private Ledger and the Representative is that of a company and an independent contractor. The Representative shall pay his/her own expenses, is not required to work a set number of hours, is not required to attend meetings, shall control the manner of doing his/her business within the framework outlined herein, and may pursue other non-securities related business opportunities. The Representative is paid on a commission basis only.

(C) The Representative is required to conform to the rules and regulations of the NASD, SEC, NFA, CFTC and the various states, to the applicable federal and state laws, and to conform to the established customs and procedures of the securities industry. In complying with such laws, rules and regulations, Representative shall accept such supervision and control by his/her branch manager and officers of Private Ledger as is necessary to enforce such laws, regulations and rules.

4. Termination of Agreement.

(A) This Agreement shall be effective on the date of execution set forth below and shall automatically renew the April 15 next following and each April 15 thereafter until terminated.

(B) In any event this Agreement may be terminated by either party at any time, without cause, by giving thirty (30) days written notice to the other party.

(C) This Agreement is automatically terminated by cancellation of Representative's coverage by the surety company or upon cancellation or non-renewal of any required license. This Agreement may be terminated by Private Ledger at any time without notice for a breach of this Agreement by the Representative.

(D) Death of the Representative shall terminate this Agreement but the date of termination shall be considered to be sixty (60) days after the date of death.

5. Rights on Termination.

Representative acknowledges that Private Ledger is not required to pay any commissions on termination except as specified herein, and that Private Ledger may elect to pay other terminated representatives bonuses in a manner inconsistent with these provisions and that such shall not give the Representative any right whatsoever to similar treatment. Private Ledger will offer to a representative in good standing a Terminated Representative Agreement (TRA). A TRA must be requested in writing within thirty (30) days after the effective date of termination.

In the event that death causes the termination of this Representative Agreement [paragraph 4 (D)], Private Ledger will offer a Back End Participation Agreement (BEP Agreement) to the estate or designated beneficiary of the deceased Representative. This offer will be subject to all laws, regulations, terms, and practices governing such an offer, and Private Ledger will have no responsibility to make BEP payments if such payments would be in violation of any such laws, regulations, terms, or practices.

Any branch manager agreements and override commission agreements entered into between the Representative and his/her Branch Office Manager also terminate upon the termination of this Agreement.

Upon termination, the Representative shall cease using the name Private Ledger, shall no longer hold himself/herself out as a representative and shall return all materials bearing the Private Ledger name to Private Ledger.

6. Miscellaneous.

The schedules attached are subject to change on thirty (30) days written notice. Unless Representative notifies Private Ledger in writing prior to the effective date of the changed schedule(s) that he/she is officially terminating his/her registration with Private Ledger, he/she will be bound by the terms of the changed schedule(s).

This agreement shall be construed in accordance with the laws of the State of California. If any legal action is necessary to enforce any of the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney's fees in addition to any other relief to which he/she may be entitled.

Any disputes under this Agreement, including interpretation of its terms and conditions, and any rights and obligations of the parties hereunder shall be arbitrated in accordance with the Rules of the National Association of Securities Dealers with such arbitration to occur in San Diego, California, or alternatively in Los Angeles, California, if Private Ledger so elects.

A waiver by Private Ledger of any breach of this Agreement shall not be construed to be a waiver of any subsequent or other breach, and no waiver shall be deemed made, unless the same is so acknowledged by the Corporation in writing.

IN WITNESS WHEREOF, the parties hereto have executed their agreement in duplicate on this _____ day of _____, 19___, in _____, California.

_____ 12/5/87

REPRESENTATIVE'S SIGNATURE DATE

RONALD A. HARRY

NAME PRINTED

PRIVATE LEDGER FINANCIAL SERVICES, INC.

By: _____ Jan. 11, 1988

DATE

J. A. Boynton, Vice Pres

TITLE

Private Ledger
EQUITY COMPANY

REPRESENTATIVE AGREEMENT - Schedule A- Commissions

Payments to Representative. In Section 1 (B) of the Representative Agreement Private Ledger is obligated to pay the Representative 90% of the commissions generated from sales by the Representative and received by Private Ledger during the term of the Representative Agreement annexed hereto. The commissions received by Private Ledger to be multiplied by 90% to determine the payment due the Representative are:

(A) 100% of commissions from the sale of mutual funds and variable annuities.

(B) 100% of commissions from the sale of "public offerings" which are the subject of a registration statement filed with the SEC under the Securities Act of 1933 (the "1933 Act").

(C) 100% of commissions from the sale of public offerings qualified for sale in only one state pursuant to Rule 147 promulgated by the SEC under Section 3(a) (11) of the 1933 Act ("intrastate offering").

(D) 85% of commissions from the sale of securities offered pursuant to the provision of Regulation D promulgated by the SEC under the 1933 Act ("private placements"). Commissions on private placements are also subject to the following:

(i) In the event the Representative of Private Ledger generates more than $50,000 in commissions from private placements in one calendar year, in January of the following year the Representative shall be paid a bonus of 3% of commissions over $50,000, and an additional bonus of 3% of commissions over $100,000.

(ii) In the event Private Ledger receives a portion of the general partner's profit or gain in a program as a result of the sales generated by Representative, the 85% rate set forth above shall apply to the portion of such amounts received by Private Ledger attributable to the Representative's sales ("back end participations"), if the Representative is registered with Private Ledger on the date Private Ledger is paid such installment.

(iii) The 85% rate set forth shall apply to commissions from private placements paid to Private Ledger in installments, if the Representative is registered with Private Ledger on the date Private Ledger is paid such installment.

(E) 50% of basis points received on client cash management accounts in excess of $10 per quarter (this commission amount will not be subject to the 90% multiplier).

(F) 85% of commissions earned on sales of gems, precious metals, and collectables.

(G) 85% of commissions from sales of general securities (stocks, bonds, options, government agency obligations, and similar securities) and commodities in routine broker transactions. Clearing costs and variable charges according to Schedule C attached shall be deducted as a general adjustment.

(i) Gross commission from general securities and commodities sales shall be subject to a special bonus as follows:

Gross Commissions/Month	Computed Amount	Bonus	Maximum Amount
$ 0 - 2,500	$ 0	0.00%	0
$ 2,500 - 6,250	$ 3,750	2.50%	93.75
$ 6,250 - 10,000	$ 3,750	3.25%	140.63
$ 10,000 - 20,000	$ 10,000	5.00%	500.00
$ 20,000 - 30,000	$ 10,000	7.50%	750.00
$ 30,000 - 40,000	$ 10,000	10.00%	1,000.00
$ 40,000 - +++++	Unlimited	12.00%	Unlimited

(ii) The Representative may negotiate commission rates with clients as dictated by market requirements, but in no event shall discounts of more than 50% from the Private Ledger base commission (pre-May, 1975, fixed commission rates plus 30%) be allowed except by prior arrangement with the Head Trader or a Private Ledger officer. In any event, the commission retained by Private Ledger on any discounted transaction shall not be less than the retention Private Ledger would earn for the same trade with a 50% discount in commission.

Paragraphs A through G are subject to change upon thirty (30) days notice.

Private Ledger's determination of the type of securities being offered or the type of program shall be conclusive. Private Ledger shall establish the percentage rate, to be multiplied by 90%, for programs or securities not specifically described above. Payments to the Representative (including Production Bonuses) will be reduced by Private Ledger by the amounts owed to Private Ledger.

Production Bonuses

Production bonuses will be paid in addition to the basic 90% commission referred to in Section 1(B) of the Representative Agreement.

1. The production bonuses apply to the gross commissions paid to Private Ledger during the period January 1 to December 31. Gross commissions from one calendar year may not be deferred to the succeeding calendar year for purposes of determining production bonuses. Gross commissions do not include any bonuses paid by Private Ledger. Private Ledger shall make final determination of gross commissions to be used as the basis for computing production bonuses.

2. The production bonuses are as follows.

   A bonus of 1.% of gross commissions between $100,000 and $250,000.*

   A bonus of 2.% of gross commissions in excess of $250,000. *

   *Production bonuses are computed on incremental dollars only. There is no production bonus for gross commissions of less than $100,000.

3. Production bonuses will be paid at the time gross commissions exceed the thresholds cited in paragraph 2 above (i.e. $100,000 and $250,000).

Private Ledger

REPRESENTATIVE AGREEMENT - Schedule B - Fees

The Representative shall be required to pay:

MONTHLY FEES	BRANCH MANAGER	REGISTERED REPRESENTATIVE
90% Contract Fee	$125	$125
ANNUAL RENEWALS		
NASD Renewal	$ 50	$ 50
Branch Renewal	$ 60	
State Renewals	$ 00 - $132	$ 00 - $132
Compliance Inspection	$ 50 - $150	$ 50 - $150
State Branch Renewal (Where applicable)	$ 00 - $ 50	
Administrative Assistant Fee (Initial and annual)		$100
MISCELLANEOUS FEES		
NASD Examinations	$ 50	$ 50
SIPC Branch Certification	$ 4 - $ 6	
Commodities Associated Person (Initial and annual)	$ 40	$ 40
Commodities Associated Person Branch (Initial and annual)	$ 16	$ 16
START-UP FEES		
A deposit of $350 will be required for initial registration. (This deposit is non-refundable once application is made to the NASD.)		
Registration Fee	$150	$100
NASD Registration	$ 64	$ 64
State Registration	$ 0 - $132	$ 0 - $132
NASD Branch Fee	$ 60	
Bonding	$ 10 per month	$ 10 per month
Compliance Inspection	$ 50 - $150	$ 50 - $150
Establish Branch Office in State (Where applicable)	$ 0 - $ 50	

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Private Ledger
A CAPITAL COMPANY

REPRESENTATIVE AGREEMENT - Schedule C - Fully Disclosed Business

This Schedule sets forth the clearing charges and brokerage charges for transactions executed through a Private Ledger clearing broker.

This Schedule is subject to change upon thirty (30) days notice.

CLEARING AND BROKERAGE CHARGES

	PERSHING	
	Order	Variable Charge
Listed:		
Stocks	$23.50	+ $0.025/share (1-4999 shares) or + $0.015/share (5000 & over)
Bonds	$25.00	
Options	$18.00	+$1.35 - $1.50/contract
OTC Agency:		
Stocks	$23.00	
Bonds	$25.00	
OTC Principal:		
Stocks	$35.00	
GNMA, Muni, Corporate, Treasury	$35.00	
Unit Trusts	$35.00	
Option Exercise	$ 23.50 Equity $300.00 Currency	
Syndicate	$35.00	

Private Ledger
Financial Services, Inc.
P.O. Box 85253
5871 Oberlin Drive
San Diego, California 92138-5253
(619) 450-9240

Private Ledger
A CROWN COMPANY

jb 1-13-88

Representative Name RONALD A. HARRY

June 11, 1987

MEMORANDUM

TO: All Private Ledger Registered Representatives

FROM: Jonathan A. Boynton
Vice President - Legal & Regulatory Affairs

SUBJECT: Private Securities Transactions/Selling Away

The NASD has recently revised and adopted a new Article III, Section 40 of the Rules of Fair Practice which further clarifies the responsibilities of members and their registered representatives in dealing with private securities transactions.

The following issues concerning private securities transactions deserve special attention:

- The definition of a "security" is very broad. Private Ledger must make the determination on every transaction as to whether or not a security is involved.

- Participation by a registered representative in a private securities transaction requires written notification to and written approval by Private Ledger, regardless of whether or not there is any compensation involved in the transaction.

What follows is a copy of the new rule in its entirety. Please read the material very carefully and return a signed copy of this memorandum to the attention of the Compliance Department. This will become a permanent part of our files.

Additionally, please place a copy in the front of your Private Ledger Procedures Manual. You will be held accountable for its contents.

EXHIBIT

SECTION 40: PRIVATE SECURITIES TRANSACTIONS

(A) Applicability - No person associated with a member shall participate in any manner in a private securities transaction except in accordance with the requirements of this section.

(B) Written Notice - Prior to participating in any private securities transaction, an associated person shall provide written notice to the member with which he is associated describing in detail the proposed transaction and the person's proposed role therein and stating whether he has received or may receive selling compensation in connection with the transaction; provided however that, in the case of a series of related transactions in which no selling compensation has been or will be received, an associated person may provide a single written notice.

(C) Transactions for Compensation -

(1) In the case of a transaction in which an associated person has received or may receive selling compensation, a member which has received notice pursuant to Subsection (b) shall advise the associated person in writing stating whether the member:

(a) approves the person's participation in the proposed transaction; or

(b) disapproves the person's participation in the proposed transaction.

(2) If the member approves a person's participation in a transaction pursuant to Subsection (c)(1), the transaction shall be recorded on the books and records of the member and the member shall supervise the person's participation in the transaction as if the transaction were executed on behalf of the member.

(3) If the member disapproves a person's participation pursuant to Subsection (c)(1), the person shall not participate in the transaction in any manner, directly or indirectly

(D) Transactions Not For Compensation - In the case of a transaction or a series of related transactions in which an associated person has not and will not receive any selling compensation, a member which has received notice pursuant to Subsection (b) shall provide the associated person prompt written acknowledgment of said notice and may, at its discretion, require the person to adhere to specified conditions in connection with his participation in the transaction.

(E) Definitions - For purposes of this section, the following terms shall have the stated meanings:

(1) "Private securities transaction" shall mean any securities transaction outside the regular course or scope of an associated person's employment with a member, including, though not limited to, new offerings of securities which are not registered with the Commission, provided however that transactions subject to the notification requirements of Article III, Section 28 of the Rules of Fair Practice, transactions among immediate family members (as defined in the Interpretation of the Board of Governors on Free-Riding and Withholding) for which no associated person receives any selling compensation, and personal transactions in investment company and variable annuity securities, shall be excluded.

(2) "Selling compensation" shall mean any compensation paid directly or indirectly from whatever source in connection with or as a result of the purchase or sale of a security, including, though not limited to, commissions; finder's fees; securities or rights to acquire securities; rights of participation in profits, tax benefits, or dissolution proceeds, as a general partner or otherwise; or expense reimbursements.

Representative Signature

Date: 12/5/87

RONALD A. HARRY

PrivateLedger

MAY 10 1988

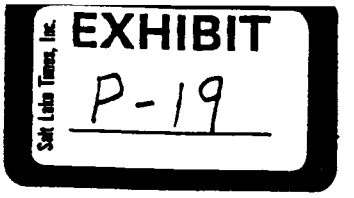
PROCEDURES MANUAL RECEIPT

I HAVE RECEIVED MY COPY OF THE PRIVATE LEDGER FINANCIAL SERVICES, INC. PROCEDURES MANUAL. I HAVE READ AND UNDERSTAND ITS CONTENTS. THIS MANUAL WILL REMAIN THE PROPERTY OF PRIVATE LEDGER FINANCIAL SERVICES, INC. AND WILL BE RETURNED UPON TERMINATION.

NAME: R. W. Hall SIGNATURE:

DATE MAILED: April 29 DATE RECEIVED: 5/3/88

**PLEASE RETURN TO THE REGISTRATION DEPT. PLFS REP.# 2656



II. Compliance

A. Prohibited Transactions

B. Rules of Fair Practice

C. Branch Office Organization and Responsibilities

1. Supervisory Responsibilities

2. Records Retention

3. Summary of Required Branch Files

D. Customer Complaints

E. Regulatory Inquiries and Examinations

F. Violations

G. Compliance Questionnaire

H. Outside Business Questionnaire

I. Compliance Notes

J. Office Visits

K. Advertising

L. Business Cards and Letterhead

M. Correspondence

N. Private Securities Transactions

O. Options Trading

P. Recommending Securities

Q. Blue Sky Requirements

R. Sale of Restricted Securities

S. Discretionary Accounts

T. Employee Accounts

U. Representative State Registration

II. Compliance

V. Purchaser Representative

W. Secondary Sales

X. Registered Investment Advisers

Y. Money Managers and Market Timers

A. Prohibited Transactions

Registered Representatives are specifically prohibited from:

1. Accepting or receiving, directly or indirectly, from any person, firm, corporation or association other than the Company, compensation of any nature as a bonus, commission, fee, gratuity, or other consideration, in connection with any transaction, in the investment field or what might be construed to be an investment, except with the prior written consent of the Company. Sales of non-securities made under state licenses, such as real estate or insurance licenses, are excluded. Many investment vehicles in the real estate and insurance areas are securities. (Please note "Private Securities Transactions", Section L.) A definition of investment for purposes of this rule includes any security, as defined in Section 2 of the Securities Act of 1933, real or personal property which can be construed in commonly used terminology to be an investment (an outlay of money for income or profit), e.g. gold, silver, diamonds, painting, antiques.

2. Taking or receiving, directly or indirectly, a share in the profits or losses of any customer's account.

3. Rebating, directly or indirectly, to any person, firm or corporation, any part of the compensation he receives as a Registered Representative. The Registered Representative will not pay such compensation or any part thereof to any person, firm, or corporation as a bonus, commission, fee or other consideration for business sought or procured.

4. Accepting orders from a third party for a customer's account without the prior written authorization of the customer.

5. Opening a securities account or commodities account with another firm for the representative or spouse without prior written approval of the Company.

6. Warranting or guaranteeing the present or future value or price of any security, or that any company or issuer will meet its promises or obligations.

7. Agreeing to repurchase at some future time a security from a client for the representative's own

account, for the account of the Company, or for any other account.

8. Acting as personal custodian of securities, stock power, money, or other property belonging to a client.

9. Borrowing money or securities from a client.

10. Forwarding or agreeing to forward confirmations or statements of accounts other than to the official Post Office address of the client.

11. Distributing to clients research material marked for "internal use only" or "for broker/dealer use only".

12. Settling errors directly with a client without the approval of the Compliance Department.

13. "Trafficking" or trading mutual funds. (See Mutual Funds).

14. Holding a discretionary power of attorney for a client's account.

15. Soliciting or selling products which have not been approved by Private Ledger Financial Services, Inc.

16. Soliciting or selling a security which has not been "Blue Skyed" in the state of sale.

17. Soliciting or selling products in a state in which the Registered Representative is not properly licensed.

18. Recommending investments to clients without thoroughly understanding their financial situation and investment objectives.

19. Maintaining a joint securities account with a client or sharing in any benefit resulting from a securities transaction.

20. Accepting a check from a client made payable to a representative rather than to the appropriate investment.

21. Opening a trust account for a minor other than a custodial "gift to minors" account.

M. Correspondence

1. Statement Guidelines

Statements to be avoided in correspondence are those:

a. That may be construed as unreasonable, exaggerated or based on rumor.

b. That forecast specific performance.

c. That give assurance against losses.

2. Outgoing Correspondence

All outgoing correspondence, including letters, memos and hand written notes pertaining to the solicitation or execution of securities transactions must be reviewed and approved in advance of mailing by the branch office manager unless such material (e.g. form letters), have previously been approved by the Compliance Department.

3. Incoming Correspondence

All incoming correspondence, other than personal letters not related to securities business, must be reviewed by the Branch Office Manager prior to distribution.

4. Correspondence Retention

Copies of outgoing correspondence are to be initialed by the Branch Manager and retained in the Branch Office Correspondence File.

5. Company Notification

Any incoming item which might be construed as a complaint or a proposed agreement, assignment, lien or settlement must be brought to the immediate attention of the Compliance Department.

N. Private Securities Transactions

It has been the NASD's experience that a number of respondents in disciplinary proceedings have argued that if they engaged in selling private placements exempt from registration under the 1933 Act, they had no responsibility to inform the member with whom they are registered of their activities or to become associated

with another broker/dealer. This is not the case in that such activity must be reported to the member. Extreme caution should be exercised by members and associated persons in determining whether a sales activity involves a security and whether that security should be registerd prior to sale.

Many individuals become involved in the sale of private securities without first notifying the member broker-dealer because they mistakenly believe or have been advised that the products they are selling are not securities. This belief may have arisen through conversations with attorneys, accountants, issuers and/or general partners who have taken a position that the product to be offered is not a security and can therefore be sold without first notifying the member firm. Most people are aware of the fact that stocks, bonds or debentures are considered to be securities. However, somewhat unfamiliar is the term "investment contract" which is also a security. Viewed in very broad, general layman's terms, an investment contract can be defined as, where one or more individuals invest in a common venture with the expectation of receiving a monetary return on their investment from or through the efforts of a third party. Examples of such investment contracts are the sale of limited partnerships in real estate, oil and gas, cattle producing and feeding, airplanes, worm farms, second deeds of trust where funds are pooled, etc. Therefore, if you are approached to sell a particular investment product that is not approved by Private Ledger you must request in writing that you be permitted to sell the product as a non-security. Do not sell the product until you receive written approval from Private Ledger.

O. Options Trading

The final review and approval of all options accounts remains with the firm's Senior Registered Options Principal. No trades are to be entered until final approval is obtained from the Home Office.

1. Qualifications

a. The Registered Representative must be Series 7 registered.

b. The Registered Representative must successfully pass the in-house administered NASD Options Exam prior to entry of any option orders.

1) The exam must be administered by a Company Registered Options Principal.

V. Limited Partnerships

A. Definitions

B. Private Securities Transactions

C. Selling Away

D. Purchaser Representatives

E. Order Processing

F. Due Diligence

1. New Offering Submission Procedures

2. Sponsor's Procedures

3. Consideration Criteria

4. Review Time

5. Program Approval

6. Suitability

7. Rejection

G. Private Programs

1. Structure

2. Disclosure

3. Offering Restrictions

4. Advertising

5. Determining Interest

6. Offer Suitability

7. Offeree Questionnaire

8. Warning

9. Exemption-Intrastate Offering

H. Marketing Support

I. Summary

A. Definitions

1. Private Ledger Approved Program - A limited partnership for which Private Ledger has a current selling agreement. Each program needs its own selling agreement.

   Example: A signed selling agreement for XYZ-1 does not permit a representative to sell units of XYZ-2.

2. Direct Participation Program - Any program that provides for flow through tax consequences regardless of the structure of the legal entity or vehicle for distribution. (e.g. Oil & Gas Partnerships, Real Estate Partnerships, Condominium Securities or Corporate Offerings).

3. Private Offering - Any unregistered or exempt from registration offering which may only be offered to a limited number of specifically qualified investors. No advertising is permitted on a Private Offering.

4. Public Offering -

   a. SEC Registered: This is a registered offering which is usually available to the general public and may be advertised.

   b. Intrastate: This is a public program that may only be sold to residents of the state in which the program is registered.

5. Prospectus - An Offering Memorandum, Offering Circular or other descriptive material for a partnership. Specific information must be contained in this document.

6. Due Diligence - The process of determining the accuracy, validity and reasonableness of the economic and tax benefits that a "prudent man" would consider before investing.

B. Private Securities Transactions

It has been the NASD's experience that a number of respondents in disciplinary proceedings have argued that if they engaged in selling private placements exempt from registration under the 1933 Act, they

had no responsibility to inform the member with whom they are registered of their activities or to become associated with another broker/dealer. This is not the case in that such activity must be reported to the member. Extreme caution should be exercised by members and associated persons in determining whether a sales activity involves a security and whether that security should be registered prior to sale.

Many individuals become involved in the sale of private securities without first notifying the member broker-dealer because they mistakenly believe or have been advised that the products they are selling are not securities. This belief may have arisen through conversations with attorneys, accountants, issuers and/or general partners who have taken a position that the product to be offered is not a security and can therefore be sold without first notifying the member firm. Most people are aware of the fact that stocks, bonds or debentures are considered to be securities. However, somewhat unfamiliar is the term "investment contract" which is also a security. Viewed in very broad, general layman's terms, an investment contract can be defind as, <u>where one or more individuals invest in a common venture with the expectation of receiving a monetary return on their investment from or through the efforts of a third party</u>. Examples of such investment contracts are the sale of limited partnerships in real estate, oil and gas, cattle producing and feeding, airplanes, worm farms, second deeds of trust where funds are pooled, etc. Therefore, if you are approached to sell a particular investment product that is not approved by Private Ledger you must request in writing that you be permitted to sell the product as a non-security. Do not sell the product until you receive written approval from Private Ledger.

C. <u>Selling Away</u>

The sale of securities by a representative, not offered through and by Private Ledger, may subject the representative to a serious violation of Federal and State Securities Laws and Regulations. In some instances, serious sanctions have been imposed on representatives for engaging in securities transactions effected outside the scope of the NASD and not reflected on the books of the broker/dealer.

The sale of securities by a representative not reflected on our books is prohibited. Such sales

will be grounds for immediate termination for cause.

D. Purchaser Representative

There is a clear conflict of interest when a Registered Representative acts as a Purchaser Representative on one of his own sales, therefore, he cannot do so under any circumstances. A Purchaser Representative should be knowledgeable in securities matters, chosen by the client and not beholden in any manner to those having an interest in the sale of the security concerned.

E. Order Processing

Prior to soliciting any sales in a private or public limited partnership the representative should contact the Private Ledger Due Diligence Department to ensure that the product has been approved and that a current selling agreement is on file. Do not sell any program that has not been approved.

Branch Offices may submit orders directly to the sponsor or underwriter provided the following steps are taken:

1. Investment application and check are reviewed and approved by the branch manager prior to being sent to the sponsor.

2. A new account form is completed for the client.

3. A copy of the application, check and new account form is filed in the branch office client file.

4. A copy of the application, check and new account form is forwarded to the Home Office with the Weekly Branch Sales Report.

F. Due Diligence

The Due Diligence Division of the Company reviews private and public limited partnerships with a view towards the following:

- Ensuring adherence to applicable laws, rules and regulations of the securities industry with regard to all issues sold through the Company.

- Protecting the Company, affiliated representatives and clients from undue liability and/or violations of law.

I. Broker Services

A. Branch Office Start-up Kit

B. Becoming a Branch Manager

C. Building a Branch Office

1. Sponsoring a Representative

2. Administrative Associate

D. Recruiting Bonus

E. Financial Institution Services

F. Special Services

1. Publications

2. Research

3. Automated Network

4. Representative Employee Benefit Plan

5. Forms

G. Product Marketing Representatives

H. Corporate Brochures

I. Corporate Seminars

J. Cashflo

III. Registration

A. NASD Registration and Approval

B. License Types and Limitations

C. Commodities License

D. State Registration

   1. California

   2. Outside California

E. Representative Contracts

F. Insurance Licensing

IV. Mutual Funds

A. Order Processing

1. Mail Orders

2. Wire Orders

3. Pershing Account

4. Donaldson, Lufkin & Jenrette Retirement Account

B. Exchanges

C. Change of Broker/Dealer

D. Confirmations

E. Rights of Accumulation

F. Letter of Intent

G. Liquidations and Transfers

1. Required Documents

2. Event of Death

H. Prohibited Selling Practices

I. Marketing Support

VI. General Securities

A. Opening an Account

B. Account Registrations

C. Required Documents

D. Account Transfers

E. Delivery Instructions

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G. Margin Requirements

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   1. Types of Orders

   2. Order Execution and Reporting

   3. Cancellations and Corrections

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J. Options

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L. Restricted Securities

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N. Death of a Client

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B. Required Documents

C. Record Retention

D. Margin Requirements

E. Order Entry

   1. Order Ticket Information

   2. Types of Orders

   3. General Rules for Order Entry

   4. Cancellations, Corrections and Order Errors

F. Commodity Options

G. Closing an Account

H. Advertising/Solicitation

VIII. Insurance

A. Definitions

B. Available Products

C. Procedures

D. Licensing

1. First Time Application

2. Existing License

3. Appointment to Insurance Companies

E. Support Services

F. Summary

Private Ledger

EXHIBIT
Salt Lake Tanst, In
P-20

REPRESENTATIVE COMPLIANCE QUESTIONNAIRE

Representative: (Please Print) RON HARRY dc 1-27-89

Phone #: (801) 537-7600 Office ID#: ~~3836~~ 3709 Rep ID#: ~~0836~~ 2636 Date: 10/17/88.

1. Have you read your copy of the Private Ledger Procedures Manual? YES (If no, provide explanation).

2. To the best of your knowledge, are you complying with company practices as outlined i this manual? YES (If no, provide explanation).

3. Since joining PLFS, have you acted as an agent for a client, individual or company (including insurance, real estate, etc.) other than PLFS? NO (If yes, provide explanation).

4. Have you received any compensation (including commissions, finder's fees, etc.) from any person or company for the purchase or sale of non-securities investments which ar not offered through PLFS? NO. (If yes, provide explanation).

5. Have you offered any investment (either a public or private offering) not approved b PLFS that you have been involved with in the last year as a representative, agent or general partner? NO (If yes, provide explanation).

6. Please provide the information listed below for ANY private offering not approved by PLFS that you have been involved with in the last year as a representative, agent or general partner.

Date	Offering Name	Number of Clients Investing	Total $$ Clients Invested	Commissions Paid to You

- ...these disclaimers of liability to PLFS signed by you and all of your customers for the

8. Have you ever warranted or guaranteed the present or future price of any security? No (If yes, provide explanation).

9. Have you ever warranted or guaranteed that any company or issuer of securities will me its promises or obligations? No (If yes, provide explanation).

10. Have you ever agreed to repurchase at some future time a security from a client for yc own account, or any other account? No (If yes, provide explanation).

11. Have you ever executed orders for a customer without his knowledge? No. (If yes, provide explanation).

12. Have you ever used any clients' money or securities for your personal use? No. (If yes, provide explanation).

13. Have you personally received money from a client or paid money to a client? No. (If yes, provide explanation).

14. Do you have any discretionary accounts? No. (If yes, provide explanation).

15. Do you hold any powers of attorney permitting you to perform transactions for a customer? No. (If yes, provide explanation).

16. Have you ever contributed, as a loan or otherwise, to help a customer pay for a securities purchase? No (If yes, provide explanation).

17. List any account in which your customer has received two or more Regulation T extensio in the past six months. (Explain circumstances of each).

19. Are you maintaining a joint securities account with any client (other than a spouse or immediate family member) or sharing any benefit with a client involving a security transaction? No (If yes, provide explanation).

20. Have you ever entered into any business transaction jointly with a client? No (If yes, please explain the transaction and with whom it was conducted).

21. Have you ever held any customer funds or securities which came into your possession? YES If yes, were they transmitted immediately? YES.

22. Have you acted as a custodian of securities, stock powers, money or property belonging to a client? No (If yes, provide explanation).

23. Do you individually, jointly, or through any interest hold stock accounts with any other broker/dealer? No If so, do you have written permission from PLFS and have you given full disclosure of your employment to the management of the office where the account is held? _____ Is the account coded so that duplicate confirmations and statements are sent to PLFS? _____

24. Have you in the past year caused any advertising to be placed in newspapers, radio, TV or other similar media (including yellow pages)? YES If yes, did you have each advertisement approved by PLFS? YES

25. Have you ever mailed a form letter or printed mailer to ten or more persons without prior approval of PLFS? No (If yes, provide explanation).

6. Is all written correspondence transmitted by you concerning securities and investments approved in accordance with the Private Ledger Procedures Manual? YES (If no, provide explanation).

27. Are all copies of outgoing correspondence, whether typed or handwritten, retained? YES If yes, where is it located for inspection purposes? CORRESPONDENCE FILE

28. Are you acting as an investment advisor and/or providing investment advice for a fee or charge? NO If no, you may proceed to Question 29. If yes, please complete the additional questions listed below.

Are you registered with the SEC, the appropriate regulatory agency in your state of residence and any other states in which you charge a fee for investment advisory business? _____ If yes, under what name are you registered?

Do you utilize a written investment advisory agreement or contract with clients? _____ If yes, please provide a copy of the contract. Additionally, please provide copies of any literature, agreements, forms, etc. that you utilize with your investment advisory customers.

Have you provided a copy of your Form ADV (parts I and II) as filed with the SEC and th appropriate regulatory agency in each state in which you charge fees to the PLFS Compliance Department? _____ If no, please provide a copy of your most current Form ADV.

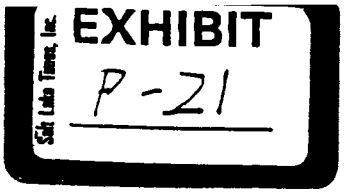
Do you, as an investment advisor, have direct or indirect control of any client's assets? _____ (If yes, provide explanation).

29. PLEASE PROVIDE ONE OF YOUR BUSINESS CARDS AND ONE PIECE OF STATIONERY WHICH YOU ARE USING FOR SECURITIES BUSINESS, WHETHER OR NOT WE HAVE IT ON FILE.

I hereby certify that all answers are true and correct to the best of my knowledge, and that the statements and answers provided above represent an accurate description of my present business activities.

10/12/88 _____

Date Registered Representative Signature



Red River Mountain Limited Partnership
1355 East Brown Road, Suite 14
Mesa, Arizona 85203
602 832-4114

July 10, 1989

Mr. Virl W. Thornton
Virl W. Thornton Trust
1520 KenRey
Salt Lake City, Utah 84108

Dear Mr. Thornton:

This is a reminder of the critical nature of compliance with your payment obligations to Red River Mountain Limited Partnership.

We previously advised you of the amount and due date of the required payment. The partnership is under obligation for this year's annual payment on the underlying loans which is now delinquent.

Your delay of payment is jeopardizing the entire partnership standing and threatens to throw our property into a foreclosure. Therefore, please see to it that your payment is in my hands within five (5) days from the date of this letter.

Sincerely,

Ross N. Farnsworth, Jr.

RNF/paz

ADDENDUM B

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 920114 Ct. of App. No. 900473-CA
v.	:	
C. DEAN LARSEN,	:	Category No. 14
Defendant-Petitioner.	:	

BRIEF OF RESPONDENT

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ON WRIT OF CERTIORARI TO
TO THE UTAH COURT OF APPEALS

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 920114 Ct. of App. No. 900473-CA
v.	:	
C. DEAN LARSEN,	:	Category No. 14
Defendant-Petitioner.	:	

BRIEF OF RESPONDENT

JURISDICTION AND NATURE OF PROCEEDINGS

This case is before the Court on a writ of certiorari to the Utah Court of Appeals. This Court has jurisdiction to hear the case under Utah Code Ann. § 78-2-2(3)(a) (Supp. 1992).

STATEMENT OF ISSUES PRESENTED AND STANDARDS OF REVIEW

Two issues are presented for review:

1. Did the court of appeals correctly conclude that "intent to defraud" is not an element of securities fraud under Utah Code Ann. § 61-1-1(2) (1989) and properly uphold the trial court's instructions on the requisite mental state for a criminal violation of that statute?

The interpretation of a statute is a question of law and is reviewed for correctness. Ward v. Richfield City, 798 P.2d 757, 759 (Utah 1990).

2. Did the court of appeals correctly conclude that the trial court had reasonably exercised its discretion in admitting expert testimony on the issue of "materiality"?

"Whether a piece of evidence is admissible is a question of law, and [an appellate court] always review[s] questions of law under a correctness standard," but when the rule of evidence "vests a measure of discretion in the trial court," the appellate court reverses only if it concludes that the trial court exercised its discretion unreasonably. State v. Ramirez, 817 P.2d 774, 781-82 n.3 (Utah 1991).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional provisions, statutes, or rules pertinent to the resolution of the issues presented for review is contained in the body of this brief.

STATEMENT OF THE CASE

The State charged defendant with numerous offenses, including eighteen counts of securities fraud under Utah Code Ann. § 61-1-1(2) (1989) and Utah Code Ann. § 61-1-21 (1989) (amended 1990, 1991, 1992) (R. 511-26). After the trial court granted defendant's motion to sever (R. 1023), he was tried on the eighteen counts of securities fraud. A jury found him guilty on all counts (R. 1434-51).

The court sentenced defendant to the Utah State Prison for a term of zero to three years on all eighteen counts, three of the terms to run consecutively to the others, which are to run concurrently, and ordered him to pay fines and restitution on each count (R. 1474-91). The execution of the sentence was stayed until resolution of the other counts charged in the information (ibid.). Defendant filed a petition for a

certificate of probable cause which was eventually granted, and defendant is currently free on bail.

On appeal, the Utah Court of Appeals affirmed defendant's convictions. State v. Larsen, 828 P.2d 487 (Utah App. 1992). This Court granted certiorari. State v. Larsen, 836 P.2d 1385 (Utah 1992).

STATEMENT OF FACTS

Given the questions presented for review, a statement of facts beyond that set forth in the Statement of the Case is unnecessary.

SUMMARY OF ARGUMENT

Criminal liability for a violation of Utah Code Ann. § 61-1-1(2) (1989) does not require proof of intent to defraud in addition to proof of willfulness. Therefore, the court of appeals correctly upheld the trial court's instructions to the jury which defined "willfully" as the culpable mental state for the crime of securities fraud under section 61-1-1(2). Additionally, because section 61-1-1(2) does not require proof of an intent to defraud, the court of appeals correctly upheld the trial court's refusal to give defendant's requested instruction on the defense of "good faith."

Defendant fails to demonstrate that the court of appeals, applying an abuse of discretion standard of review, incorrectly upheld the trial court's admission of expert testimony on the issue of "materiality." In light of case law from this court and the federal courts interpreting rules 702 and

704 of the Rules of Evidence, the court of appeals properly concluded that the trial court had reasonably exercised its discretion in admitting the expert testimony.

ARGUMENT

POINT I

THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT'S INSTRUCTIONS CONCERNING THE MENTAL STATE FOR A CRIMINAL VIOLATION OF UTAH CODE ANN. § 61-1-1(2) (1989) WERE PROPER; IT ALSO CORRECTLY UPHELD THE TRIAL COURT'S REFUSAL TO GIVE DEFENDANT'S REQUESTED INSTRUCTION ON THE DEFENSE OF GOOD FAITH

Defendant argues that the court of appeals erred in holding that the trial court correctly refused to give two of his requested jury instructions concerning the elements of and defenses to securities fraud. The first of those instructions would have told the jury that, for purposes of Utah Code Ann. § 61-1-1(2) (1989) and Utah Code Ann. § 61-1-21 (1989) (amended 1990, 1991, 1992)[1], an act or omission "is done 'wilfully' if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say with bad purpose either to disobey or disregard the law[,] . . . the bad purpose . . . be[ing] the specific intent to defraud." Defendant's Requested Jury Instr. No. 5 (R. 1355) (Appendix B to Br. of Pet.). The second would have instructed the jury that "a representation made by the Defendant in good faith constitutes a complete defense to a charge of Securities Fraud." Defendant's

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[1] Hereafter, all references to Title 61 provisions are to the 1989 volume of the Code.

Requested Jury Instr. No. 30 (R. 1381) (Appendix B to Br. of Pet.).

The trial court purported to give defendant's instruction no. 5 in substance, excising the references to bad purpose and intent to defraud and simply instructing the jury that the culpable mental state for securities fraud is "willfully." Jury Instr. Nos. 14, 17, 17A (R. 1309, 1312, 1313) (Appendix C to Br. of Pet.). The court refused to give defendant's good faith instruction; however, it informed the jury that "ignorance or mistake of fact which disproves the culpable mental state is a defense to any prosecution for that crime." Jury Instr. No. 17A (R. 1313).

On appeal, the court of appeals upheld the trial court's instructions. Defendant asserts this was error. In that the court of appeals' holding is based on an interpretation of statutes, that holding is reviewed for correctness. See Ward v. Richfield City, 798 P.2d 757, 759 (Utah 1990) (interpretation of statute involves question of law reviewed for correctness); State v. Maguire, 830 P.2d 216 (Utah 1992) (no deference accorded court of appeals' conclusion on question of law).

Defendant claims that United States Supreme Court cases interpreting federal securities laws dictate that section 61-1-1(2) be interpreted to require proof of "scienter" (i.e., intent to defraud, manipulate, or deceive)[2], and therefore the trial

[2] Defendant uses the term "scienter" as it was defined in Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976): "intent to deceive, manipulate, or defraud." Hereafter, the State

court and the court of appeals incorrectly concluded otherwise. Furthermore, he claims that because a good faith defense goes hand-in-hand with the intent to defraud element, the trial court incorrectly refused to give the requested good faith instruction.

The court of appeals rejected defendant's arguments on the ground that the "Utah Code specifies willfulness as the culpable mental state for securities fraud" and the trial court's "instruction on willfulness mirror[ed] the statutory definition." State v. Larsen, 828 P.2d 487, 495 (Utah App.), cert. granted, 836 P.2d 1383 (Utah 1992). Although the court of appeals' analysis might have been more thorough, its approval of the trial court's instructions is correct.

A. Intent to Defraud

As defendant notes, in 1963 the legislature substantially adopted the Uniform Securities Act, calling it the Utah Uniform Securities Act. See § 61-1-1 et seq.; Unif. Securities Act, 7B U.L.A. 515-680 (1985) (hereafter cited as Unif. Act, 7B U.L.A. ___). Section 61-1-1, which is at issue in this case, is nearly identical to section 101 of the Uniform Securities Act. Section 101 contains the same language as Federal Securities and Exchange Commission Rule X-10b-5 (rule 10b-5). As the official comments to the Uniform Securities Act make clear, section 101 "is substantially the Securities and Exchange Commission's Rule X-10b-5, which in turn was modeled upon § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a)."

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generally will refer to "scienter" as "intent to defraud."

Official Comment, Unif. Act, 7B U.L.A. 516.

Section 61-1-27 provides that the Utah Uniform Securities Act "*may* be so construed as to effect its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this chapter with the related federal regulation" (emphasis added). Relying on this section and the history of the Uniform Securities Act, defendant argues that, because the United States Supreme Court has held that a civil action under rule 10b-5 requires proof of an intent to defraud, a criminal prosecution under section 61-1-1(2) necessarily requires proof of intent to defraud in addition to proof of willfulness. However, this argument ignores the plain language of the pertinent statutes and, alternatively, misapplies the Supreme Court decisions.

1. Plain Language

Defendant was convicted under section 61-1-1(2), which makes it

> unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly to . . . make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading[.]

Criminal liability attaches when a person "willfully" violates that provision. § 61-1-21. Nothing in the plain language of sections 61-1-1(2) and 61-1-21 gives rise to an intent to defraud element. Those sections are clear and unambiguous: securities fraud is committed when a person "willfully" makes a misstatement

or an omission of a material fact. "Willfully" is defined elsewhere in the Code to mean the same thing as "intentionally" or "with intent." Utah Code Ann. § 76-2-103(1) (1990)[3]. There is no reference to the additional element of "intent to defraud."

Defendant reaches far beyond the plain language of the statutes to construe section 61-1-1(2) as requiring an intent to defraud in addition to the element of willfulness. He ignores the settled principle that, in determining legislative intent, this Court begins with a statute's plain language and will resort to other methods of statutory interpretation only if the language of the statute is ambiguous. See Shurtz v. BMW of N. Am., Inc., 814 P.2d 1108, 1112 (Utah 1991); Bonham v. Morgan, 788 P.2d 497, 500 (Utah 1989) (per curiam). He also fails to acknowledge that when the terms of a statute are unambiguous, an appellate court construes those terms in accord with their usual and accepted meaning. State v. Menzies, 182 Utah Adv. Rep. 3, 15 n.27 (Utah Mar. 11, 1992). This Court has correctly rejected defendant's approach in a similar case.

In State v. Delmotte, 665 P.2d 1314, 1325 (Utah 1983) (per curiam), the defendant argued that the trial court "erred in failing to instruct that intent to defraud is a necessary element of a bad check charge." The Court rejected this argument on the ground that "the offense calls for no such element." Ibid.

---

[3] Section 76-2-103(1) provides: "A person engages in conduct . . . [i]ntentionally, or with intent or *willfully* with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result" (emphasis added).

Indeed, the legislature had eliminated the "intent to defraud" element from the statute, making it clear that "[t]he element of 'knowledge' of the overdraft is now sufficient to support a conviction." Ibid. See also State v. Bergwerff, 777 P.2d 510, 511 (Utah App. 1989) (holding that intent to defraud an insurance company is not an element of aggravated arson because such an intent is not contained in the plain language of the statute).

The court of appeals correctly looked to the plain language of sections 61-1-1(2) and 61-1-21 in concluding that the culpable mental state for a criminal violation of section 61-1-1(2) is "willfully." It properly rejected defendant's argument that intent to defraud is a required, additional mental element of the offense. Cf. State v. Facer, 552 P.2d 110, 111 (Utah 1976) (identifying "intentionally" as the culpable mental state for securities fraud). Other courts interpreting similar statutes have concluded that the plain language requires nothing more than proof the defendant acted "willfully." For instance, the Wisconsin Court of Appeals, interpreting securities fraud statutes nearly identical to sections 61-1-1(2) and 61-1-21, held that Wisconsin's false statement provision did not require an intent to defraud because the statute "makes no reference to intent to defraud." State v. Temby, 108 Wis.2d 521, 528, 322 N.W.2d 522, 526 (1982). Relying on the principle that "[w]hen statutory language is unambiguous, th[e] court will arrive at the intent of the legislature by giving the language its ordinary and accepted meaning," the court of appeals concluded that "had the

legislature wanted to require specific intent to defraud, it would have explicitly stated so." 108 Wis.2d at 530, 322 N.W.2d at 527. Rather, the legislature had identified "wilfully" as the culpable mental state. 108 Wis.2d at 529-30, 322 N.W.2d at 526-27.

In a similar context, the California Court of Appeal, construing California's securities fraud laws, stated:

> It is settled that the omission of "knowingly" from a penal statute indicates that guilty knowledge is not an element of the offense. Had the Legislature intended to require proof of guilty knowledge or scienter under section 25540, it could have so stated by using the word "knowingly." Willfulness does not require proof of evil motive or intent to violate the law or knowledge of illegality.

People v. Johnson, 213 Cal.App.3d 1369, 262 Cal.Rptr. 366, 369 (1989).

Additionally, a survey of the Utah Code reveals that when the legislature intended to make intent to defraud the culpable mental state for an offense, it used the words "intent to defraud." See, e.g., Utah Code Ann. §§ 23-20-27 (1991), 39-6-104(4) (1988), 41-1a-1319 (Supp. 1992), 76-6-506.1 (Supp. 1992), 76-6-518 (1990), 76-10-706 (1990), 76-10-1006 (1990). Compare Utah Code Ann. § 59-1-302(9)(c) (1992) ("The commission or court need not find a bad motive or specific intent to defraud . . . to establish willfulness under this section."). This further supports the court of appeals' plain language approach and its ultimate rejection of defendant's proposed construction of section 61-1-1(2).

2. Beyond the Plain Language

Even if this Court were to accept defendant's invitation to look beyond the plain language of the statutes, he ignores pertinent language in the official comments to the Uniform Securities Act and misapplies the United States Supreme Court decisions he claims are controlling.

Defendant contends that because the source of section 61-1-1 -- section 101 of the Uniform Securities Act -- is substantially rule 10b-5, Utah's statute must be interpreted in the criminal context as the Supreme Court has construed rule 10b-5 in civil actions. He bases this contention on section 61-1-27, which provides that Utah's securities fraud laws "*may* be so construed as to effectuate its general purpose to . . . coordinate the interpretation and administration of this chapter with the related federal regulation" (emphasis added).

An initial problem with this position is that section 61-1-27 says Utah's securities act "may," rather than "shall," be construed to coordinate its interpretation with related federal regulation. The Uniform Securities Act contains a "shall" provision: "This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this act with the related federal regulation." Unif. Act § 415, 7B U.L.A. 678. Defendant does not note or discuss this significant difference between Utah's law and the Uniform Securities Act. Indeed, this distinction undermines the basic

premise of his argument: that "the Utah Act *must* be construed to effectuate this 'general purpose' ['to coordinate the interpretation of this chapter with the related federal regulation']." Br. of Pet. at 9-10 (first emphasis added). The truth is the legislature preferred a more flexible approach which does not bind Utah's courts to federal court interpretations of federal securities laws.

But even beyond this defect in defendant's argument, neither the Supreme Court cases nor the official comments to the Uniform Securities Act dictate that section 61-1-1(2) be interpreted to require an intent to defraud.

The Supreme Court Cases

Defendant relies principally on Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976). There, the issue was "whether an action for civil damages may lie under § 10(b) of the Securities Exchange Act of 1934 . . . and Securities and Exchange Commission Rule 10b-5 . . . in the absence of an allegation of intent to deceive, manipulate, or defraud on the part of the defendant." 425 U.S. at 187-88.[4] Based on a review of the

[4] Section 10b, from which rule 10b-5 derives, makes it "'unlawful for any person . . . (b) [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.'" Hochfelder, 425 U.S. at 195 (quoting 15 U.S.C. § 78j). Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any

plain language of section 10(b) and its legislative history, the Court held that a private cause of action for damages will not lie under section 10(b) and rule 10b-5 "in the absence of any allegation of 'scienter' -- intent to deceive, manipulate, or defraud." Id. at 193.

Relying on this language from Hochfelder, defendant asserts that criminal liability under section 61-1-1(2) will not lie unless there is proof of intent to defraud in addition to proof of willfulness. Defendant erroneously views Hochfelder in isolation and fails to give due consideration to at least one other significant Supreme Court case.

When the Court decided Hochfelder, it "was primarily concerned with rejecting Hochfelder's contention that mere negligent omissions sufficed to establish a claim under Rule 10b-5." United States v. Chiarella, 588 F.2d 1358, 1370 (2nd Cir. 1978), rev'd on other grounds, 445 U.S. 222 (1980). See also

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national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

Hochfelder, 425 U.S. at 197. In concluding that a private action under § 10(b) and rule 10b-5 requires an allegation of "scienter," Hochfelder did not thoroughly analyze the specific language of rule 10b-5; rather, the Court focused primarily on the language of § 10(b) and its legislative history. See 425 U.S. at 212. The Court noted that rule 10b-5 "was a hastily drafted response to a situation clearly involving intentional misconduct . . . [and,] [a]lthough adopted pursuant to § 10(b), the language of the Rule appears to have been derived in significant part from § 17 of the 1933 Act, 15 U.S.C. § 77q." 425 U.S. at 212-13 n.32. Thus, if the *language* of rule 10b-5, which provided the model for section 101 of the Uniform Securities Act, is to be fairly interpreted in light of all the relevant Supreme Court case law, this Court must also examine decisions interpreting section 17(a) of the 1933 Act.

Section 17(a) provides:

> It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly --
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or

deceit upon the purchaser.

15 U.S.C. § 17q(a). The language of this statute is very similar to that of rule 10b-5 and section 61-1-1. In fact, section 61-1-1(2) is a mirror image of section 17(a)(2). The Supreme Court determined what mental state is required for a violation of section 17(a) in Aaron v. SEC, 446 U.S. 680 (1980).

There, the Court held that under section 17(a), "scienter" (i.e., intent to deceive, manipulate, or defraud) is required for subsection (1) but not subsections (2) and (3). 446 U.S. at 697. Focusing on the plain language of subsection (2), the language at issue in the instant case (see 61-1-1(2)), the Court said:

> [T]he language of § 17(a)(2), which prohibits any person from obtaining money or property "by means of any untrue statement of a material fact or any omission to state a material fact," is devoid of any suggestion whatsoever of a scienter requirement. As a well-known commentator has noted, "[t]here is nothing on the face of Clause (2) itself which smacks of *scienter* or intent to defraud." 3 L. Loss, Securities Regulation 1442 (2d ed. 1961). In fact, this Court in Hochfelder pointed out that the similar language of Rule 10b-5(b) "could be read as proscribing . . . any type of material misstatement or omission . . . that has the effect of defrauding investors, whether the wrongdoing was intentional or not."

Id. at 696 (citation omitted).

In short, contrary to defendant's contention, the Supreme Court case law interpreting related federal regulation does not dictate that section 61-1-1(2) be construed to require proof of an intent to defraud. Aaron's analysis of section

17(a), which through rule 10b-5 was a model for section 101 of the Uniform Securities Act and therefore section 61-1-1, is at least as instructive as Hochfelder when it comes to interpreting section 61-1-1(2). Thus, it is not surprising that several state courts have relied on Aaron in holding that their 61-1-1(2)-type provisions do not require an intent to defraud. See, e.g., State v. Temby, 108 Wis. at 528-29, 322 N.W.2d at 526-27; People v. Whitlow, 89 Ill.2d 322, 334-35, 433 N.E.2d 629, 634, cert. denied, 459 U.S. 830 (1982).

Official Comments to the Uniform Securities Act

An additional flaw in defendant's argument becomes apparent when the official comments to pertinent provisions of the Uniform Securities Act are examined. Section 409 of the Act provides that criminal liability attaches when a person "willfully" violates a provision of the Act. The Utah Legislature adopted a similar provision in section 61-1-21 which, as previously noted, sets forth the willfulness requirement for criminal liability.

The official comment to section 409 refers the reader to the comment under section 204(a)(2)(B) for "the meaning of 'willfully.'" Official Comment, Unif. Act § 409, 7B U.L.A. 632. That comment states in pertinent part:

> As the federal courts and the SEC have construed the term "willfully" in § 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(b), all that is required is proof that the person acted intentionally in the sense that he was aware of what he was doing. Proof of evil motive or intent to violate the law, or knowledge that the law

was being violated is not required.

Official Comment, Unif. Act § 204(a)(2)(B), 7B U.L.A. 545. This passage expressly condemns the "specific intent to violate the law/bad purpose" element of defendant's requested instruction no. 5 (R. 1355) (Appendix B to Br. of Pet.). It also seriously undercuts defendant's argument that to establish a criminal violation of section 61-1-1(2) there must be proof of intent to defraud in addition to proof of willfulness.

Significant State and Federal Criminal Cases

Defendant also fails to give due weight to either the substantial state case law holding that an intent to defraud is not an element of 61-1-1(2)-type statutes or the handful of federal securities fraud decisions that have addressed the "scienter" question in the criminal context.

On the state level, numerous courts have held that intent to defraud is not an element of the crime of securities fraud under statutes similar to section 61-1-1(2); proof that the defendant acted "willfully" is all that is required. See, e.g., People v. Mitchell, 175 Mich.App. 83, 437 N.W.2d 304, 306-08 (1989), appeal denied, 433 Mich. 895 (1990); People v. Johnson, 213 Cal.App.3d 1369, 262 Cal.Rptr. 366 (1989), review denied (Cal. Dec. 21, 1989); People v. Whitlow, 89 Ill.2d 322, 433 N.E.2d 629, 633-34, cert. denied, 459 U.S. 830 (1982); State v. Temby, 108 Wis.2d 521, 322 N.W.2d 522, 525-27 (1982); State v. Fries, 214 Neb. 874, 337 N.W.2d 398, 404-05 (1983); State v. Ross, 104 N.M. 23, 715 P.2d 471, 474 (N.M. App. 1986); State v.

Tarzian, 136 Ariz. 238, 665 P.2d 582, 585-86 (Ariz. App. 1983). See also Garvin v. Greenback, 856 F.2d 1392, 1397-98 (9th Cir. 1988) (construing Arizona statutes); Van Duyse v. Israel, 486 F. Supp. 1382 (E.D. Wis. 1980) (construing Wisconsin statutes). Except for Illinois, all of the states represented in these decisions have, like Utah, substantially adopted the Uniform Securities Act. Unif. Act, 7B U.L.A. 509-14. Therefore, the decisions are instructive, if not persuasive, authority. See State v. Swenson, 838 P.2d 1136, 1138 (Utah 1992) (relying on decision from Michigan, another Uniform Securities Act state, when interpreting a provision of the Utah Uniform Securities Act).

Although defendant criticizes these state cases as inconsistent with Hochfelder, the previous discussion of Hochfelder demonstrates that defendant's reliance on that case as *the* controlling authority is not sound. And, while defendant finds some support for his position in State v. Puckett, 6 Kan.App.2d 688, 634 P.2d 144, 152 (1981), aff'd, 230 Kan. 296, 640 P.2d 1198 (1982), and People v. Terranova, 38 Colo.App. 476, 563 P.2d 363 (Colo. App. 1977) (but see People v. Blair, 579 P.2d 1133, 1138-39 (Colo. 1978) (en banc) (which supports the State's position)), those decisions appear to represent a minority view.

Furthermore, defendant's attempt to distinguish some of the contrary state decisions on the ground that they do not address statutory provisions similar to section 61-1-27, fails because he misreads section 61-1-27 as setting forth a "specific

legislative *directive* . . . to construe [the uniform securities] laws in accordance with the related federal regulation." Br. of Pet. at 13 (emphasis added). As previously noted, under section 61-1-27 the courts "may" construe Utah's laws to coordinate with the related federal regulation; the legislature did not mandate that they do so. Therefore, as both the trial court and the court of appeals were free to do, this Court may interpret section 61-1-1(2) not to require an intent to defraud, regardless of what conclusions the federal courts may have reached with respect to the related federal regulation.

Finally, defendant overlooks several post-Hochfelder criminal 10b-5 cases that have upheld jury instructions similar to those given in defendant's case. In United States v. Chiarella, 588 F.2d 1358 (2nd Cir. 1978), rev'd on other grounds, 445 U.S. 222 (1980), a major issue was "the level of intent necessary to support a conviction for criminal violations of Rule 10b-5." 588 F.2d at 1370. Under 15 U.S.C. § 78ff, criminal liability attaches for "willful" violations of any securities rule or regulation (this is the federal counterpart to Utah's section 61-1-21). The trial court had instructed the jury

> that it could not convict Chiarella unless it found that he had acted "knowingly" and "willfully," and defined these terms to mean that "the defendant must be aware of what he was doing and what he was not doing" and that he must be acting deliberately, and not as a result of "innocent mistakes, negligence, or inadvertence or other innocent conduct."

588 F.2d at 1370. Just as defendant does here, Chiarella did not dispute the trial court's instruction on willfulness but, citing

Hochfelder, contended "that when the substantive provisions are § 10(b) and Rule 10b-5, the Government must prove the additional element of specific intent to defraud." Ibid.

Observing that "Chiarella was convicted under a charge requiring the jury to find beyond a reasonable doubt that he engaged in 'knowingly wrongful' misconduct," the Second Circuit held that Hochfelder did not require more than this and the trial court "correctly refused to charge the jury that the Government must prove specific intent to defraud." Id. at 1371. The court relied in part on United States v. Charnay, 537 F.2d 341 (7th Cir.), cert. denied, 429 U.S. 1000 (1976), where in a similar vein, the Seventh Circuit held that an indictment was not fatally defective because it failed "to allege a specific intent to defraud," 537 F.2d at 351-52.

Thus, the few reported decisions in criminal 10b-5 cases have rejected defendant's intent to defraud argument. As noted in United States v. Chestman, 704 F. Supp. 451, 459 (S.D.N.Y. 1989), aff'd in part and rev'd in part on other grounds, 947 ~~U.S.~~ F.2d 551 (2nd Cir. 1991):

> In a criminal case alleging violations of SEC rules, § 78ff provides the level of intent required for conviction. The government must prove willful misconduct, which is to say that the defendant was aware of what he was doing, that his acts were done intentionally and deliberately and not as a result of an innocent mistake, negligence or inadvertence. See United States v. Dixon, 536 F.2d 1388, 1395, 1397 (2nd Cir. 1976); United States v. Chiarella, 588 F.2d 1358, 1370 (2d Cir. 1978), rev'd on other grounds, 445 U.S. 222, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1979).

704 F. Supp. at 459.

Defendant's Strict Liability Argument

Defendant suggests that if an intent to defraud element is not read into section 61-1-1(2), this "would permit sweeping, *strict-liability* prosecutions." Br. of Pet. at 13 (emphasis added). This is simply wrong. To convict under section 61-1-1(2), the State must prove the defendant acted "willfully," see § 61-1-21, a highly culpable mental state. An offense is a strict liability offense only when "the statute defining the offense clearly indicates a legislative purpose to impose criminal responsibility for commission of the conduct prohibited by the statute without requiring proof of any culpable mental state." Utah Code Ann. § 76-2-102 (1990).

B. Good Faith Defense

Finally, defendant argues that the trial court erroneously rejected his instruction on a "good faith" defense. The court of appeals did not explicitly address this point; however, its holding concerning an intent to defraud element for section 61-1-1(2) effectively disposed of the issue.

As defendant notes, "[h]and-in-hand with the scienter element is the consistent notion that good faith is a defense." Br. of Pet. at 11. Yet, because intent to defraud is not an element of section 61-1-1(2), a good faith defense is not applicable. See, e.g., Sparrow v. United States, 402 F.2d 826, 828-29 (10th Cir. 1968) (making clear that the good faith defense does not apply to "the defendant's good faith as to the existence

of any particular fact or situation," and cautioning that although a good faith defense exists with regard to the plan or scheme as a whole, "no matter how firmly the defendant may believe in the plan, his belief will not justify baseless, false, or reckless representations or promises"); United States v. Boyer, 694 F.2d 58, 60 (3rd Cir. 1982).

Therefore, the court of appeals correctly upheld the trial court's refusal to give defendant's good faith instruction.

POINT II

THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT REASONABLY EXERCISED ITS DISCRETION IN ADMITTING EXPERT TESTIMONY ON THE ISSUE OF "MATERIALITY"

Defendant asks this Court to reverse the court of appeals' holding that the trial court did not abuse its discretion in allowing the State's expert to give opinion testimony concerning the "materiality" of information defendant failed to disclose to investors. (Materiality is an element of securities fraud which the State must prove under section 61-1-1(2). Larsen, 828 P.2d at 493.) Although the State conceded below that the issue was a close one, defendant fails to show that the court of appeals erred.

The court of appeals reviewed the trial court's evidentiary ruling on the expert testimony under an abuse of discretion standard, noting that it would not reverse "in the 'absence of a clear abuse of discretion.'" Larsen, 828 P.2d at 492 (quoting Lamb v. Bangart, 525 P.2d 602, 607-08 (Utah 1974)). See also State v. Span, 819 P.2d 329, 332 (Utah 1991) ("As long

as the testimony 'will assist the trier of fact to understand the evidence or to determine a fact in issue,' Utah R. Evid. 702, admission is generally within the discretion of the trial court even if such testimony addresses an 'ultimate issue.'"). Cf. State v. Ramirez, 817 P.2d at 781-82 n.3 ("[w]hether a piece of evidence is admissible is a question of law, and we always review questions of law under a correctness standard," but when the rule of evidence "vests a measure of discretion in the trial court," the appellate court reverses only if it concludes that the trial court exercised its discretion "unreasonably").

Defendant does not challenge the court of appeals' standard of review. Moreover, he does not demonstrate that the court of appeals incorrectly concluded that the trial court reasonably exercised its discretion. In fact, where the issue was necessarily a close one, the court of appeals correctly deferred to the trial court's decision which was reasonably supported by the analysis in United States v. Lueben, 812 F.2d 179, 183 (5th Cir.), modified, 816 F.2d 1032 (5th Cir. 1987), and the broad construction this Court recently gave to rules 702 and 704, Utah Rules of Evidence, in State v. Span, 819 P.2d at 332 n.1 ("Case law supports the proposition that an expert may render an opinion that certain actions constitute a crime. . . . As long as the testimony will 'assist the trier of fact to understand the evidence to determine a fact in issue,' . . . its admission is

generally within the discretion of the trial court[.]").[5]

In short, the court of appeals would have been justified in finding an abuse of discretion "only if there was no reasonable basis for the [trial court's] decision." Crookston v. Fire Insurance Exchange, 817 P.2d 789, 805 (Utah 1991) (applying the "abuse of discretion" standard in reviewing trial court's decision on motion for new trial) (footnote omitted). Defendant does not demonstrate that the court of appeals was compelled to find an abuse of discretion on the ground that there was no reasonable basis for the trial court's decision.

The court of appeals relied heavily on Lueben in upholding the trial court's evidentiary ruling. In that case, the Fifth Circuit, reviewing a conviction for making materially false statements to a federally insured savings and loan institution, held that the trial court had erroneously excluded the testimony of a defense expert witness regarding the

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[5] Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 704 provides:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

materiality of false statements allegedly made to the financial institution. The court rejected the claim that the expert's opinions constituted legal conclusions and therefore were inadmissible under rule 704, Federal Rules of Evidence. It reasoned that "Lueben sought to ask [the expert] the factual question of whether false statements in this case would have 'the capacity to influence' a loan officer of a savings and loan institution, not the legal question of whether the statements were 'material.'" 812 F.2d at 184.[6]

The court of appeals likened the testimony of the State's expert in defendant's case to the fact-oriented inquiry on materiality discussed in Lueben:

> [W]e are persuaded by Lueben that use of the term "material" may be admitted as permissible fact-oriented testimony. Upon review of the record, we conclude that the expert in this case used the term "material" in a factual sense.

Larsen, 828 P.2d at 493.

Defendant criticizes the court of appeals' reliance on Lueben and focuses on three cases: Scop v. United States, 846 F.2d 135 (2nd Cir.), modified on rehearing, 856 F.2d 5 (1988); Marx & Co., Inc. v. Diner's Club, Inc., 550 F.2d 505 (2nd Cir. 1977), cert. denied, 434 U.S. 861 (1977); and Adalman v. Baker,

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[6] The Fifth Circuit's modification of its original opinion did not appear to disturb the substance of its analysis on this point. Although in its modifying opinion the court held that the question of "materiality" was a legal question for the judge, rather than a fact question for the jury, it did not criticize the original opinion's analysis of the rule 704 issue. Lueben, 816 F.2d at 1033.

Watts & Co., 807 F.2d 359 (4th Cir. 1986). The court of appeals correctly distinguished these cases from Lueben on the ground that they illustrate the inadmissibility of legal conclusions by an expert under rule 704. For example, in Scop, the court was troubled because the expert "made no attempt to couch the opinion testimony at issue in even conclusory factual statements but drew directly upon the language of the statute and accompanying regulations concerning 'manipulation' and 'fraud.'" 846 F.2d at 140. The court commented that "[h]ad the expert merely testified that controlled buying and selling of the kind alleged here can create artificial price levels to lure outside investors, no sustainable objection could have been made." Ibid.

In Marx, the court held that the trial court erred in allowing an expert witness, who was qualified as an expert in securities regulation, to give his opinion as to the legal obligations of the parties under a contract. The court first noted that "[t]estimony concerning the ordinary practices of those engaged in the securities business is admissible under the same theory as testimony concerning the ordinary practices of physicians or concerning other trade customs: to enable the jury to evaluate the conduct of the parties against the standards of ordinary practice in the industry." 550 F.2d at 509. However, it concluded that the expert's testimony "did *not* concern only the customary practices of a trade or business;" the expert had improperly rendered legal opinions as to the meaning of the contract terms at issue. Id. at 509-10.

And, in Adalman, a party sought to have an expert witness "testify as to his conclusion that the applicable law did not require the disclosure of . . . omitted information [in a securities offering]." 807 F.2d at 365. In upholding the trial court's exclusion of such testimony, the court, relying heavily on Marx, observed that "it is obvious that [the party] proffered [the expert] to testify in substantial part to the meaning and the applicability of the securities laws to the transactions here, giving his expert opinion on the governing law[;] this flies squarely in the face of the precedent -- and logic of that precedent -- set out in Marx." Id. at 368.

Reading Scop, Marx, Adalman, and Lueben together in an effort to apply them to the instant case is indeed a difficult task. See Davidson v. Prince, 813 P.2d 1225, 1231 (Utah App.) ("There is no bright line between permissible questions under Rule 704 and those that call for overbroad legal responses."), cert. denied, 826 P.2d 651 (Utah 1991). At first blush, it might appear that the trial court abused its discretion in admitting the expert's opinions. However, unlike the testimony in Scop, Marx and Adalman, the expert's testimony here did not constitute a legal opinion. His testimony was more akin to the opinion testimony on the factual question discussed in Lueben: whether the false statements had the capacity to influence. While it clearly would have been better for the expert to steer away from the term "material," he appears to have used the term not in the legal sense but rather in the factual sense of what the ordinary

practice in the industry is, or what would be important to or have the capacity to influence an investor. In any event, the testimony appears to be well within the limits of rule 704 as defined in State v. Span, 819 P.2d at 332 n.1, where this Court noted that "[c]ase law supports the proposition that an expert may render an opinion that certain actions constitute a crime" and then cited with apparent approval the following cases: United States v. Buchanan, 787 F.2d 477, 483-84 (10th Cir. 1986) (officer of Bureau of Alcohol, Tobacco, and Firearms was allowed to testify that a device was a firearm subject to registration with the Bureau); United States v. Logan, 641 F.2d 860, 863 (10th Cir. 1981) (expert properly testified that funds were improperly taken from corporation); and United States v. Carroll, 518 F.2d 187, 188 (6th Cir. 1975) (expert properly testified that certain drugs come within a particular statutory classification).

In sum, in light of Lueben and this Court's expansive interpretation of rules 702 and 704 in Span (relying on federal cases), the court of appeals did not err in holding that the trial court reasonably exercised its discretion in admitting the expert testimony under rules 702 and 704. See State v. Banner, 717 P.2d 1325, 1333-34 (Utah 1986) (the appellate courts of this state look to the interpretation of the federal rules of evidence by the federal courts to aid in interpreting Utah's rules of evidence). As the court of appeals correctly observed, "[i]n general, expert testimony is suitable in securities fraud cases because the technical nature of securities is not within the

knowledge of the average layman or a subject within the common experience and would help the jury understand the issues before them." Larsen, 828 P.2d at 492 (citing rule 702 and Dixon v. Stewart, 658 P.2d 591, 597 (Utah 1982)).[7]

CONCLUSION

Based on the foregoing arguments, the Court should affirm the court of appeals' decision.

RESPECTFULLY submitted this 21st day of December, 1992.

R. PAUL VAN DAM
Attorney General

David B. Thompson

DAVID B. THOMPSON
Assistant Attorney General

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[7] Defendant claims that the court of appeals "apparently read Rule 704 to mean that opinion testimony is admissible if it goes to an issue of ultimate fact because, by definition, it is not a legal conclusion." Br. of Pet. at 24-25. However, this is refuted by the court's clear statement that "[d]espite the appropriateness of expert testimony on an ultimate issue, Rule 704 was not intended to allow experts to give legal conclusions." Larsen, 828 P.2d at 493.

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief were hand-delivered to David L. Arrington, Van Cott, Bagley, Cornwall & McCarthy, 50 South Main Street, Suite 1600, P.O. Box 45340, Salt Lake City, Utah 84145 and Larry R. Keller, 257 Towers, Suite 340, 257 East 200 South - 10, Salt Lake City, Utah 84111, this 23rd day of December, 1992.

David B. Thompson

ADDENDUM C

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * * * *

STATE OF UTAH Plaintiff, vs. RONALD ALAN HARRY Defendant.	Transcript of: Motion Hearing Case No. 901901580

* * * * *

The above-entitled cause of action came on regularly for hearing before the Honorable Richard H. Moffat, a Judge of the Third Judicial District Court of the State of Utah, at Salt Lake County, Utah, on Friday, April 10, 1992, at 2:25 p.m.

APPEARANCES

For the Plaintiff: DAVID SONNENREICH
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah

For the Defendant: WALTER BUGDEN
BUGDEN & LUNDGREN
257 East 200 South
Salt Lake City, Utah

INDEX OF WITNESSES

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Edward K. Brass	1	8		
James N. Barber	34	42	52	55

FRIDAY, APRIL 10, 1992 2:25 P.M.

PROCEEDINGS

THE COURT: Once again.

MR. BUGDEN: Good afternoon.

THE COURT: You are half right, it is afternoon. How are you, Mr. Bugden?

MR. BUGDEN: I am good, I think.

THE COURT: All right.

MR. BUGDEN: I am not positive. We are prepared to go forward, Your Honor. There are quite a few motions that are before you. I would like to begin by calling Mr. Brass to the witness stand.

THE COURT: Very well. Mr. Brass, come forward.

EDWARD K. BRASS

Called as a witness on behalf of the defense, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BUGDEN:

Q Will you state your name for the record, sir.

A Edward K. Brass.

Q And when did you graduate from law school, sir?

A 1977.

Q Do you have any particular areas of expertise

that are the focus of your practice?

A Criminal defense.

Q And can you tell me, sir, have you been a presenter at various seminars over the years?

A On numerous occasions. Most recently in March.

Q How many jury trials you think you have done over the years since your graduation from law school?

A It would be in the hundreds.

Q How many jury trials do you think you do a year?

A Now? 25 maybe.

Q Have you handled securities fraud trials in your practice, sir?

A Yes.

Q How many securities fraud trials have you handled? Trials, cases that have actually gone to trial?

A That have gone to trial?

Q Yes, sir.

A More than ten.

Q From your experience handling securities fraud cases, sir, is a securities fraud charge a technical case to defend?

A They are more complicated than the average criminal case, if that is what you mean by "technical." Yes, I would agree with that.

Q As a general rule, sir, you give an opening statement in jury trials?

MR. SONNENREICH: Your Honor, I don't see the relevance of Mr. Brass's practice. In fact, Your Honor, at this time it appears that this expert is going to be called for the purpose of discussing opening statements and it strikes me that that is the question of whether or not an opening statement is important to give, is one well within the Court's own ability to determine without an expert witness, and also he hasn't been qualified.

THE COURT: The Supreme Court in the question on this issue of the lack of commodated counsel at the time of trial has made several pronunciations over the years and one of them that I clearly recall, I can't tell you which case it was, was that -- Well, let's see, they differentiated between "strategic and tactical."

MR. BUGDEN: That is exactly what I intend to focus on.

THE COURT: Well, you can focus on it but it has always been my impression, Mr. Bugden, that the question as to whether or not you give an opening statement was one that counsel could -- it was purely within the prerogative of counsel and it depends upon their view of a particular case. I don't think you could make out a case of incompetence simply because they did

or didn't do opening argument.

MR. BUGDEN: Well, it is one of the factors that we are bringing before the Court. It is one of the issues where we think there was a defect under Strickland vs. Washington. The first prong requires that we give you some specific instances, specific conduct, which we believe fell below an objective standard of reasonableness.

Rule 401 of the Rules of Evidence defines what "relevant evidence" is. That apparently is the objection. "Relevant evidence," Your Honor, is defined under the rule as "Evidence having any tendency to make the existence of any facts -- " let me stop there. Do we have representation by Mr. Barber which fell below an objective standard of reasonableness? That is the fact that I believe is relevant. That is what you have to decide in this law.

THE COURT: I understand.

MR. BUGDEN: Therefore, as we keep reading, all right. So "relevant evidence means any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action," that is what this motion is all about, "more probable or less probable than it would be without the evidence."

Now, maybe you will decide --

THE COURT: That is relevance. It is not materiality, but -- Well, I will let him get into it. You are looking, I am sure, Mr. Bugden, at the overall level of performance here, some of which may have a -- may be relevant, some which may be material, and some of which may not be either, or one or the other. But I am going to let him go ahead and get into it.

MR. BUGDEN: Thank you very much.

Q (By Mr. Bugden) Generally speaking in a jury trial, do you give an opening statement, Mr. Brass?

A Generally speaking, yes.

Q And what purposes or goals are accomplished by giving an opening statement?

A Certainly the most immediate purpose is to outline your case to the jury.

Q Why is that important?

A So that they understand what your defense is.

Q Are there any different goals, Mr. Brass, in a securities fraud case than, for example, say in a burglary case?

A I think not other than, as I said before, a more complex case.

Q In a more complex case, do you think that there is a greater need to give an opening statement to familiarize the jury with certain issues?

A I am certain that that would be true.

Q Can you think of a time, sir, that you would not give an opening statement in a securities fraud case?

A Sure. If it was a multiple defendant case and I represented a person who was culpable than other defendants or the evidence was much weaker against them, perhaps I wouldn't want to make one in that case.

Q But what about in a situation where it is a single-defendant case, not a multiple-defendant case? One defendant, securities fraud, four counts, would you give an opening statement in that situation?

A Just on the facts as you have outlined for me, I can't see any reason why not.

Q If you thought, in your professional judgment, sir, that the jury was impatient -- I have to actually give you a different predicate. If you had reserved the giving of an opening statement and as the time approached for the defense to open its case, you had an opinion or a perception that the jury was impatient or bored with the evidence that they had heard, would that be a reason, in your opinion, to forego giving an opening statement in a securities fraud case?

A Again, limiting myself to the facts as you have outlined, then it might be a reason to shorten it, but might not be a reason not to give one.

Q From your experience doing hundreds of jury trials, do you have an opinion about whether or not the giving of an opening statement is an important part of the criminal defense trial?

A It can be, certainly.

Q In a securities fraud case, Mr. Brass, if one of the State's arguments to show a material omission was that the defendant, a broker-dealer, failed to disclose the possibility of future payments to an investor, but you had a document in your possession signed by the investor disclosing the possibility of future payments, would you seek to introduce that signed document through the investor?

A The answer to your hypothetical question, yes.

Q Why would you do that? Why would you choose to introduce that document through the investor?

A Because I would view that document as something that is potentially damaging to that witness's credibility, and it is much more effective to introduce it through that witness.

MR. BUGDEN: Those are the questions I have for Mr. Brass.

THE COURT: You may cross.

MR. SONNENREICH: Thank you, Your Honor. Just one second. (Pause)

CROSS EXAMINATION

BY MR. SONNENREICH:

Q Mr. Brass, when did you graduate from law school?

A '77.

Q And since that time, what type of legal work have you done?

A Primarily, criminal defense work.

Q Have you ever been a prosecutor?

A No.

Q What percentage of your practice would you say was criminal defense work?

A 90 percent.

Q You would agree, based on your earlier testimony, that there are certain types of cases in which you might choose not to make an opening statement?

A Sure, I said so.

Q And would you agree that an expert trial lawyer could reasonably choose not to give an opening statement in other situations?

A Sure.

Q Let me also ask you a hypothetical question about a signed Subscription Agreement. Let us say that you had learned through the preliminary hearing in a matter that there was a document that was a signed

Subscription Agreement that the investor who signed it, and this is a question of materiality of an omission in a securities case, there is an investor who signed it, but the investor testifies that the way that signature came about was that his broker, whom he had a very longstanding relationship with, chose to call him and say, "Come in and sign some papers." Showed him a couple of signature lines and that was all. He signed only the signature lines. He did not read the disclaimer language. He was not shown the page with the disclaimer language on it, and that his testimony was he had no knowledge of the disclaimer. And that testimony all came out in the preliminary hearing. Under these circumstances, would you try to introduce that document into evidence?

MR. BUGDEN: Your Honor, I object to the form of the question because it assumes facts that are not only not in the record, but are contrary to the preliminary hearing record. The question assumes facts that are absolutely a hundred and eighty degrees contrary to the record from the preliminary hearing. But even his facts are not before you at this time, but that is not what happened at the preliminary hearing, and I will object for that reason. The hypothetical is based on a false set of facts.

MR. SONNENREICH: Your Honor, first of all, I am more than willing to read from the preliminary hearing transcript. I was going to save that till my case, but I am happy to do it now. I mean, maybe that would make it even a better hypothetical.

THE COURT: Well, if we are going to do this, we might as well start this trial Monday morning and go for the next couple, three weeks. If you want to do that, we can do that, gentlemen. I will allow it. If, Mr. Bugden, you find later what you say is correct and the record doesn't back it up, you can bring it to the Court's attention.

MR. BUGDEN: Then I can ask you to strike it?

THE COURT: Sure.

MR. BUGDEN: All right.

THE WITNESS: Okay, that was a long hypothetical. And I am going to assume for the purpose of the hypothetical, that the prior relationship between the dealer and the customer was a favorable relationship.

MR. SONNENREICH: All right.

THE WITNESS: I am going to assume that. In assuming that and given the nature of the prosecution that we are talking about, I would be much more concerned about introducing the document because of the possibility that it might have been altered after the time that this

signed portion of the document was appended to the rest of it. I would be concerned about that and I would certainly want to inquire into that.

Q (By Mr. Sonnenreich) Might you be concerned also that if the --

MR. BUGDEN: Your Honor, may I interrupt for just a moment? I noticed that Mr. Barber was here, but there was no cognitive process on my part and I missed the point. Mr. Barber may be a witness and I would ask he be excluded and wait in the hall until we have reached a determination as to whether or not you will hear from him.

MR. SONNENREICH: I also don't know if Mr. Barber will or will not be a witness. That depends in part on whether or not he had an affidavit of his in, but I am also not sure whether the Exclusionary Rule would apply at this point.

THE COURT: Well, I am not sure whether it does or not. Do you care one way or another?

MR. SONNENREICH: I don't care one way or another.

THE COURT: Mr. Barber, do you have --

MR. BARBER: Your Honor, I just came here because actually Mr. Bugden asked me to. I don't have any desire to be here at all. (Courtroom laughter) I

was trying to accommodate counsel and not have to make Mr. Hines come over and serve a subpoena on me. I am perfectly happy to go home and leave all of you gentlemen to your work.

MR. BUGDEN: So that you understand at least why I perceived there was a need for Mr. Barber to be here is this: at the earlier hearing we introduced an affidavit which was not objected to and which was stipulated to. In this instance, the government has prepared an affidavit which I saw in the minutes before you took the bench. Mr. Barber and I had a conversation yesterday. Mr. Barber and I then had a conversation at lunch time. When Mr. Barber telephoned me at lunch time, he advised me as to what language he was willing to sign and accept in an affidavit form, and some language that he was not willing to sign or admit in an affidavit form. The affidavit that has now been prepared, I believe, is inconsistent with what Mr. Barber has discussed with me on prior occasions, and so I am not prepared to stipulate to the introduction of Mr. Barber's affidavit. And so since I am not prepared to stipulate, it is hearsay and I think it becomes necessary and incumbent upon the State's attorney to call Mr. Barber. And so if Mr. Barber is going to be a witness, then I would invoke the Exclusionary Rule. That is the procedural background.

MR. SONNENREICH: I intend to move the introduction of the affidavit as a clarification of the prior affidavit which was admitted without objection. Furthermore, affidavits are regularly received in motion practice outside of trial procedure. I am not sure the hearsay rule or any of the evidence rules apply, or that evidence should be taken in this particular proceeding, as you correctly pointed out earlier. Furthermore, frankly, it is the defendant who has the burden of proof on the question of Mr. Barber and if the defendant wants to establish what Mr. Barber knew or didn't know, he probably should call Mr. Barber, if the affidavit isn't admitted. Why don't we get a ruling on the affidavit and then Mr. Barber may be able to go home or whatever. If that would be okay, Your Honor. If we can interrupt this and solve this problem.

THE COURT: Yeah.

MR. BARBER: Do I sit down?

THE COURT: Yeah, go ahead.

MR. SONNENREICH: Your Honor, I am going to move for the admission of an affidavit of Mr. Barber that flushes out and more fully explains some of the situations concerning the prior affidavit and concerning the issues raised in the case.

THE COURT: Where was the prior affidavit?

MR. SONNENREICH: The prior affidavit was introduced on the first thing. It is about a three-page deal. This gets into the question of --

THE COURT: You have this in the form of evidence?

MR. BUGDEN: We have this in the form of an affidavit that was not objected to on March 18th on the first hearing.

THE COURT: Did we set up an evidence envelope, or did you put those in the file?

THE CLERK: No, I have got evidence envelopes. I don't see it listed (referring to the exhibit sheet.)

MR. SONNENREICH: It was a two-page exhibit. As I read that affidavit, there is actually one matter in this other affidavit that isn't in the first one, and that goes to the question of his not making an opening in the case. I thought there was a statement in the first one that he had not made an opening.

THE COURT: I have got it. It is right here. It is in the file, okay. So now the document you want to introduce now is an affidavit which supplements this affidavit?

MR. SONNENREICH: It says he didn't make an opening statement and explains why. I thought there was a statement in the first affidavit that said, "I did not

make an opening statement." There is not. But then it goes on to say why he didn't introduce that limited partnership subscription booklet that we are discussing right now. Some more views as to suitability questions as to the limited partnership portfolio lists, which were those exhibits attached to the first affidavit and also attached to the memorandum here.

THE COURT: Okay. Well, let's get his problem solved so he can get out of here. You have any more questions of him?

MR. SONNENREICH: I think if I could finish this one. If you would be able to wait, Mr. Barber, for literally two minutes outside, I could finish the cross. I think that we could get Mr. Brass off. He needs to be in another court. Then we can address the issue of whether you need to be a witness.

MR. BARBER: I will do whatever I am told to do.

THE COURT: Why don't you wait in the hall for three or four minutes.

(Mr. Barber left the courtroom.)

MR. SONNENREICH: Let's go back onto this. I am going to ask this question correct, though. Your Honor, I am going to introduce an exhibit. It is the preliminary hearing transcript. You told me it was not

part of the record in the case as it sits before you now.

THE COURT: I think that is true.

MR. SONNENREICH: Your Honor, I move the admission of the preliminary hearing transcript in this matter.

THE COURT: Any objection?

MR. BUGDEN: No, sir.

MR. SONNENREICH: This would be State's Exhibit No. 8.

Q (By Mr. Sonnenreich) Mr. Brass, if you would please turn to page 37 of that exhibit and read the testimony from lines 17 of that page 37, through line 13 on page 39.

MR. BUGDEN: For starters, Your Honor, before he begins reading the testimony, I don't have any problem with reading the testimony, but the testimony is not helpful until counsel identifies what exhibit the witness is testifying about.

MR. SONNENREICH: Your Honor, Defense Exhibit D-1 is -- the question here, it was done and one exhibit that was attached as an exhibit to this memorandum. What is the number?

MR. BUGDEN: Well, how do we know that other than you saying that?

MR. SONNENREICH: First off, and if you want me

to get under oath to say it, that is certainly a collateral matter. I can get under oath to say it.

MR. BUGDEN: No, I wouldn't agree to that. I wouldn't stipulate to that. I wasn't at the preliminary hearing.

MR. SONNENREICH: I was and I can be a witness on that point. I believe, Your Honor, I can be a witness as to what Defense Exhibit No. 1 was at the preliminary hearing. I was there. It is a collateral matter to the case.

THE COURT: I suppose you can.

MR. SONNENREICH: So likewise, Mr. Hines who was also there.

MR. BUGDEN: I would think that the best evidence is whatever the record evidence is rather than these people testifying because there is a genuine question, Your Honor, as to whether or not the witness is talking about the suitability questionnaire, or whether or not the witness is instead talking about a Subscription Agreement. They are two different documents. They are two different documents that I introduced to you and they were received into evidence by way of the affidavit at the earlier hearing, and I don't know what Exhibit 1 is that they are about to talk about.

MR. SONNENREICH: Defense Exhibit 1, Your

Honor, that was introduced as the complete group of those documents that fall under the subscription booklet, and they are listed as Appendix 1 and Appendix 2 to Mr. Bugden's motion: Memorandum in Support of Motion for a New Trial or in the Alternative a Motion in Arrest of Judgment. With all deference, Mr. Bugden, you know, if you would like, I could maybe call Max Wheeler in here to testify as to the nature of the exhibit.

MR. BUGDEN: Well, I don't know that it is appropriate for him to be debating with me. I have made an objection, Your Honor. My objection is --

THE COURT: Well, we have got a lot of other objections. I will overrule the objection. We will take that as being a true statement. If counsel can later on show that isn't true, we will have a problem about that then.

Q (By Mr. Sonnenreich) Mr. Brass, as you read that you can then take it into account that we are talking about a complete Red River Mountain Limited Partnership Subscription Agreement Booklet which includes --

MR. BUGDEN: Your Honor, if I could just interrupt to say on page 18 of the document that has now been introduced, which is the preliminary hearing transcript, the item that they are talking about is

something called a "Pre-Offering Summary." Mr. Sonnenreich --

MR. SONNENREICH: S-1 or D-1. S-1, it was a Pre-Offering Summery, I believe. D-1 -- S-1 is the Pre-Offering Summary. That was Exhibit 1 to our case, Your Honor. It is the maroon booklet.

THE COURT: Yeah.

MR. SONNENREICH: D-1 was this exhibit in this case. D-1 was the Subscription Agreement they are discussing here.

THE COURT: All right.

MR. SONNENREICH: Okay, may I proceed?

MR. BUGDEN: Well, I am at a loss to know how we know that, Your Honor? And as I understand your ruling, you have placed the burden on me to convince you after we hear the testimony that he is wrong.

THE COURT: No, we are not going to do that, Mr. Bugden. I will tell you what we are going to do. Mr. Brass, you may leave and we are going to have some discussions here as to what we are doing here today because we are really not doing what I think we ought to be doing.

(Mr. Brass leaves the courtroom and Mr. Barber comes in.)

THE COURT: I am really confused as to what we

are doing here and the way in which we are doing it. Maybe that is my fault. I haven't sat down and tried to analyze this thing. Mr. Bugden, you have made a Motion for a New Trial or In the Alternative for Arrest of Judgment. Assuming that you don't have grounds for a new trial, I guess your Arrest of Judgment is so you can appeal.

MR. BUGDEN: I am sorry. The Arrest of Judgment is not just a procedural step. I am hoping to present arguments to persuade you that that should be granted, but it is one of the steps that we have to go through to get to an appeal, if that was your question.

THE COURT: That is what I am saying. I am saying, if I decide that you have no grounds for a new trial and deny your motion, then I assume your Arrest of Judgment Motion is so that you can make your appeal without the defendant being sentenced in this case.

MR. BUGDEN: Well, I think the Arrest of Judgment procedurally exists so that even if there is not a basis for the granting of a new trial, so that the trial judge can still correct a problem at the trial stage if there is a legal reason to not enter judgment, and I think that there is, and we will get to that, or I assume we will.

THE COURT: Well, you see, I don't think --

First of all, as far as I know, and again correct me because you are the one that filed the motion, there is no such thing as a Motion for a New Trial under the criminal procedure, Rules of Criminal Procedure.

MR. BUGDEN: I think that is not right, with all due respect.

THE COURT: Then tell me where it is.

MR. BUGDEN: Well, I think it is Rule 24 and Rule 23, Your Honor, of the Rules of Criminal Procedure.

THE COURT: Of the rules? Okay, I was looking at the Code of Criminal Procedure. Okay, let me get the rules. Now, what they have done by breaking rules up into substance and rules, because that is really what we have done, and they don't tell you where they are going to put them. Here they are. Rule 23 and 24, Arrest of Judgement and an Appeal. You are right. Well, I will tell you what I think, where I am having a problem, Mr. Bugden, is that I don't think, at least it doesn't appear to me from Rule 24, that the introduction of evidence as to the -- Well, first of all, let me go back a step. Your Motion for New Trial specifies "(1) Facts proven at trial do not constitute the public offense of securities fraud."

MR. BUGDEN: Yes, sir.

THE COURT: "(2) Other good cause for arrest of

judgment." Now, I think that is too broad.

MR. BUGDEN: But I have been very specific in my memorandum of law.

THE COURT: Well, I know, but you weren't in the motion. The motion is the functional document here. I guess that is where we get into this business of about ineffective assistance of counsel.

Be that as it may, I don't think we need evidence on that. It seems to me that what we are talking about is whether or not the Court upon argument, and you pointed out where you thought the deficiencies are, can make a judgment as to whether your motion is well taken or whether it isn't.

MR. BUGDEN: I am prepared to argue. I am ready to roll.

THE COURT: All right. I don't think we need evidence on these matters. As a matter of fact, I don't see a provision in Rule 24 to the introduction of evidence. That is, evidence about how the trial was tried. I mean, I don't need any evidence. I was there. I wasn't the finder of fact, but I was there. I sat through the trial and you can tell me what you want to tell me, and I can take your argument under consideration, as well as opposing counsel's, and make a determination as to whether I agree or disagree on either

side. But I don't think I need, with all due respect to Mr. Brass, who I highly regard as a lawyer, I don't think I need him to tell me about the trial of lawsuits. All I am saying is, I don't think extrinsic evidence at this point really is proper. I really don't. I think the evidence that I have to make a decision on is present within the four corners of the record of this case.

MR. BUGDEN: Well, as I have already articulated to the Court and I thought in fact you had agreed with me, I mean, I thought I heard you say that.

THE COURT: You may have heard a lot of things, I agree.

MR. BUGDEN: My motion, Your Honor, is that we have some guidance from the rules as to what is relevant and in this case one of the two prongs of the Strickland standard that I have to satisfy is that the representation fell below an objective standard of reasonableness. So Mr. Barber's subjective opinion is not relevant. I haven't asked this attorney to render an opinion about whether or not -- I mean that is for you, I think, to decide whether or not objectively speaking certain things fell below an objective standard of reasonableness.

Then prong two is "but for those omissions, or errors, or conduct, is there an undermining of confidence

in the jury's verdict?" Is there a reasonable probability of a different result? Again, I believe that is your call. I think that that is your determination. But on the question of "will it be useful to the Court to have evidence with regard to two specific issues," is all I have talked about, I think, with regard to Mr. Brass, the significance of an opening argument. And then secondly, with regard to a Subscription Agreement. And we are talking about three different words we have heard not today, but I will refresh your recollection. There was a Pre-Offering Booklet.

THE COURT: Yeah.

MR. BUGDEN: There is a Suitability Questionnaire.

THE COURT: Yeah.

MR. BUGDEN: And finally, the --

THE COURT: The Subscription Agreement.

MR. BUGDEN: Thank you, the Subscription Agreement. Here we have Virl Thornton, Count 1, a signed document where he has signed a document that advises him of the possibility of future payments. Okay. So the two issues that I have asked Mr. Brass about are the opening argument and the significance in the securities fraud case. And secondly, the Subscription Agreement, whether or not that is something that you would want to put

before the jury, that the investor himself, who is saying this is a material omission by the broker, by the dealer, whether or not the fact that the investor actually signed a document putting him on notice, is that important? I recognize that you can make those judgments. I recognize that, but as a defense counsel with vast experience, and as you said "with all due respect to Ed," someone that you respect, someone that I think you recognize to be a well-known, extremely competent and efficient defense lawyer. Okay, I am asking him some questions about those issues and then on the question of relevance and the Strickland standard talking about objective reasonableness, a standard of objective reasonableness, will this evidence, that is the testimony of Mr. Brass, assist you with regard to determining whether or not it is more probable or not that there was a deficient performance here; whether or not they reached level one, that is, objectively, reasonable, competent counsel. So I have put on competent counsel to say, to at least discuss the importance of that opening argument.

THE COURT: The problem I have with that approach is don't we then have the other side putting on Mr. Barber himself or somebody else who says, "Well, we simply disagree under the terms and conditions that were present in this case at the time and place that it was

tried. We think that the other strategy was better done."

MR. BUGDEN: Okay, but here is the crux and you have said it today and we discussed it whenever we were here before, and that is, that case law talks at great length about whether or not a particular action was a strategic decision. And if it is a strategic decision, then historically the courts have said that the defendant himself is stuck with that result.

THE COURT: That is right.

MR. BUGDEN: If it is a strategic decision then, even if it is the wrong judgment call, we just can't have a remedy for that kind of a problem. Okay, I understand that. But in this case you had evidence last time and in fact Mr. Barber has made statements to me which would suggest this was not a strategic decision.

MR. SONNENREICH: Now, we are getting really into hearsay.

MR. BUGDEN: Well, that is why it is important. The evidence last time were that we had statements from Mr. Harry that Mr. Barber said that he forgot to give an opening statement, and that he forgot to introduce the document. Well, obviously, Your Honor, from a logical perspective, there is no strategic decision-making.

THE COURT: In that case, you are right.

MR. BUGDEN: Well, that is why it is important.

THE COURT: Well, all right, but Mr. Brass doesn't have to testify to that.

MR. BUGDEN: He can testify as to -- again, as to the second prong. I am not asking him his opinion, but I think that it is useful and helpful to the Court to know from a defense attorney's perspective why an opening argument might be important, why it might be considered important.

THE COURT: Well, Mr. Bugden, how many cases do you think I have tried here?

MR. BUGDEN: Tons.

THE COURT: Yeah, a lot more than any trial counsel does. How many cases do you think I tried for 30 years as a trial lawyer? I mean, I know the importance of an opening statement but there are times when I have waived them and I don't think -- I think it is going to be awfully difficult for either side to present evidence which says that the waiver or non-waiver of the opening statement was an act of incompetence. Now, if what you are saying is Mr. Barber admitted at some point, the horrors of the record, that he plain forgot to do it, was going to do it but failed to do it, then you may have an entirely different question. Maybe you do. Maybe you don't. Maybe it is no harm anyway. But the point I am

making is, I don't think we need evidence to make the determination as to why you give opening statements. I know why you give opening statements, so do you, so does everybody else that got out of law school and every tried a lawsuit.

What I would think we ought to do here, because if we don't we are going to retry the trial of this case, and that is going to take as long as the trial did, and when we get through we are not going to get any better result, I'm afraid. I would like you to tell me in the form of an ordinary motion, like we do all the time, you can support it with all of your affidavits, valid affidavits, why you ought to be entitled to the relief you want.

Now, we will let him do the same thing on the other side. If when we get through with that, either of you feel there are legitimate issues of fact about the trial itself that needs evidence, we will discuss that and I will decide whether or not we will allow that evidence to be put in at some point. Do you understand what I am saying?

MR. BUGDEN: Not really. I don't have any other evidence I intend to present. I have presented what I intended to present on ineffective assistance of counsel. The other arguments are all questions of law.

THE COURT: All right, okay. Maybe we are getting to where we are going anyway.

MR. BUGDEN: I am there.

THE COURT: Well, you didn't get to cross.

MR. SONNENREICH: Your Honor, it does occur to me that we have both briefed the matter about as fully as we re-brief it in a repeat briefing. The motion may not have been terribly specific, but the memorandum was adequate and I think I was able to adequately brief it, although I had to incorporate some stuff because I was short on time, that they incorporated in their earlier memorandum, in my memorandum. But given that, if you read through the whole package, I think there is adequate law on both sides.

As for Mr. Barber, quite frankly it would be the defense who has the burden of putting on and showing that Mr. Barber forgot to put him on. Your ruling the other day with respect to Mr. Harry's testimony was that if Harry said he forgot, it can only go to state of mind, and that there are any number of reasons that Barber might have said that to Harry.

THE COURT: That's true, right.

MR. SONNENREICH: So I am not intending, if the affidavit doesn't come in, I don't think I am going to call Mr. Barber either and we won't have any additional

evidence and we can go straight to argument.

MR. BUGDEN: Then they are ready to argue. I am ready to argue.

THE COURT: If the affidavit does not come in?

MR. SONNENREICH: Right, if the affidavit doesn't come in. If it comes in, great. I have already moved for its admission. If it does not come in, my feeling is and my argument is, that the burden of proof with respect to whether or not Mr. Barber forgot, with respect to whether -- as to Mr. Barber's reasoning and all the rest, that is on the defendant clearly. I am not going to put him on. He can call him if he wants. He is sitting here.

THE COURT: I think clearly the burden of proof -- Well, it may not be proof at this point. It is burden of persuasion, at the very least, on these motions is the defendant's. I don't think there is any doubt about that.

MR. SONNENREICH: So, I am ready to proceed unless --

THE COURT: I will tell you what I am going to do. I sort of had to do what we did with Mr. Brass because he was in a world of hurt, if you'll pardon the expression. He needed some relief. We have to get him back here and hear the balance and let you cross at a

later date. We will afford you the opportunity to do that.

Mr. Bugden, I am going to allow his testimony to stand. I am going to get the affidavit in. And then let's -- What more do you want to do?

MR. BUGDEN: Then I need to put on Mr. Barber and cross examine him, if you are going to allow his affidavit because I have had conversations with Jim.

THE COURT: All right.

MR. BUGDEN: And just for the record, my position is that with regard -- this isn't just simply a question of what is good for the goose is good for the gander. When the affidavit was presented at the earlier hearing, counsel stipulated. He had no objection to the receipt of that affidavit. I object to this affidavit. I think it is hearsay. Whether it is notarized or not, it is something that counsel has prepared and it is something that I have had conversation with Mr. Barber and Mr. Barber has said other things to me, things that are not included in the affidavit. So it is not the big picture. It is not a complete picture.

MR. SONNENREICH: Which is why I can introduce the affidavit. The witness is right here and he can discuss anything they want to do by way of calling him.

THE COURT: Let's do that and then let me hear

your arguments. And then if there is something more that we need to do before I make a decision, and one of them is going to be I am going to go back and go completely through your memorandums again, but if before I do that, and before I make a final determination you need or you think you need to talk with the Court about other evidence coming in, or something of the sort, you can do that. I am not trying to short circuit anybody. I am trying to get a handle on this thing so that we don't re-try the trial. That is, the procedure of trying the trial.

MR. BUGDEN: Well, I wonder since Mr. Barber has been inconvenienced, if it would make sense to put him on the witness stand now.

THE COURT: Yeah, let's inconvenience him some more.

MR. BUGDEN: Is it your ruling that you are going to admit his affidavit over my objection, is that the ruling?

THE COURT: Well, I will tell you what I am going to do. Let's put him on the stand and let him testify. When we get through, maybe we don't even have to use the affidavit.

MR. SONNENREICH: Okay, you are calling him?

MR. BUGDEN: I don't know. Who is calling him?

MR. SONNENREICH: You said you are calling him. I said all I need is in the affidavit.

MR. BUGDEN: The Judge isn't allowing the affidavit in.

THE COURT: No, I didn't say that. I said if anybody wants to put him on the stand, we will let him testify and maybe we won't even use the affidavit. On the other hand, he is going to offer the affidavit. I am probably going to grant it and then you can call him if you want. I mean, the reason you want to call him is the affidavit you say, needs to be explained and broadened, and so on and so forth.

MR. BUGDEN: All right. Well, I will call Mr. Barber.

THE COURT: All right.

MR. SONNENREICH: Your Honor, is the affidavit in or out, or we don't know?

THE COURT: We don't know.

MR. SONNENREICH: Then I will withdraw the affidavit if he is going to put him on the stand.

THE COURT: All right.

JAMES N. BARBER

Called as a witness on behalf of the defense, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BUGDEN:

Q Would you state your name for the record, sir.

A James N. Barber.

Q Mr. Barber, were you the attorney of record for Mr. Harry at the trial in this matter?

A I was.

Q And, Mr. Barber, as you think back to the trial proceedings, can you recall whether or not you gave an opening statement?

A I am certain that I did not give an opening statement.

Q Do you recall whether or not you reserved your right to give an opening statement?

A Yes, I did.

Q And do you recall whether or not you had a conversation with Mr. Harry concerning the decision to reserve that opening statement?

MR. SONNENREICH: Foundation as to time of the conversation.

THE COURT: Well, the question can be answered yes or no.

Q (By Mr. Bugden) Did you have a conversation with Ron about whether or not you would reserve it?

A I believe that there were comments exchanged

between us about that, the fact that I had not done so.

Q Do you remember who was present?

A Just he and I.

Q Would it have been on the first day of trial, or when would it have been, Mr. Barber?

A I think that I probably advised him, I don't recall a specific conversation in which I did it, but I think I probably advised him of my initial decision to waive. And the reason I did that -- Oh, you didn't ask me that. And then I believe there was another conversation after no opening statements was given prior to the initiation of the calling of the defense witnesses.

Q Let's talk about that conversation. That is a conversation you had with Mr. Harry about your failure to give an opening statement; is that right? Who was present?

A I believe that such a conversation occurred.

Q And do you remember where that occurred?

A It was either in this courtroom -- and you need to understand, Mr. Bugden, I am trying to reconstruct what occurred from the best of my recollection about it. But I think if such a conversation occurred, it either happened right there at counsel's table, we were sitting over there, I believe, or in the hall adjacent to the

courtroom.

Q And when you spoke with Mr. Harry about not giving an opening statement, do you remember whether you told him you forgot to give it?

A No, I do not specifically recall having said that.

Q Again, you have already acknowledged you did not give an opening statement. With regard to not giving an opening statement, did you give -- did you consider the merits of either giving an opening statement or not giving an opening statement before you didn't give the opening statement?

A Well, in the first place I did, yes. At the first place, I elected not to give an opening statement because the witnesses in the case, I think, made somewhat inconsistent and difficult statements to deal with. They were all three hostile, and therefore I did not believe it advisable to stand up and tell the jury what I thought they were going to say when I didn't know what they were going to say. And in the second instance --

Q Okay, now, let me just stop you so I understand. You are saying before the trial began, Mr. Barber, you are saying you decided that you were not going to give an opening statement?

A I decided I wasn't going to give it at the

beginning of the State's case.

Q Oh, all right. So you decided to reserve it?

A That is correct.

Q You used the word "waive," but you decided to reserve the opening statement?

A Have it your way. That is what I meant to say, yes.

Q And then so when you made the decision to reserve it, you apparently intended to give an opening statement at the start of your case; is that right?

THE WITNESS: Your Honor, is that a question or not?

MR. SONNENREICH: Your Honor, he is leading his witness.

THE COURT: Yes, that is a leading question.

Q (By Mr. Bugden) What were your intentions, Mr. Barber, when you reserved the right to give an opening statement?

A I thought my general impression there was that if I felt at the end of the State's case that an opening statement was appropriate and helpful, I would give one. But I still had the right not to give one and therefore I had not made any electable determination one way or the other.

Q When the defense began its case --

A I think I intended to give one though, Wally.

Q Thank you. When you began your case and didn't give an opening statement, at the precise moment that you called your first witness, did you go through a thought process where you considered the merits of "Okay, I am not going to give an opening statement"? Or "Okay, I am going to give an opening statement"?

A I do not believe I did.

Q Thank you.

A Which is just what I said in my affidavit.

MR. BUGDEN: I will ask that be stricken and ask that Mr. Barber respond to my questions.

THE WITNESS: I will.

THE COURT: Well, I will strike it. We may get the affidavit in, but that is all right. Go ahead.

Q (By Mr. Bugden) Mr. Barber, in a number of conversations you and I have had over the last several days, both yesterday and then today, did you tell me that you forgot to give the opening statement?

A I may have used the words "I forgot."

Q Thank you. You have answered my question. With regard to the introduction of the Subscription Agreement relating to Virl Thornton, do you acknowledge, Mr. Barber, that you had in your possession the Subscription Agreement at the time of the trial?

A I believe I did, yes, or Mr. Harry had it in his possession but I was aware of its existence and the fact that it was available to us.

Q And were you also aware that it was signed by Virl Thornton?

A Yes.

Q And were you also aware, sir, that that Subscription Agreement set forth the possibility of prospective payments with the Red River?

A Yes.

Q And is it true, sir, that you didn't introduce the Subscription Agreement through Virl Thornton?

A That is true.

Q And would it be accurate to say, sir, that you forgot to introduce the Subscription Agreement?

MR. SONNENREICH: Your Honor, leading again.

THE COURT: Well, no, I think that is a fair question. I will allow it.

Q (By Mr. Bugden) Would it be fair to say you forgot to introduce it through Virl?

A I cannot answer that question in the form in which you place it to me.

Q Let me ask a different question then, Mr. Barber. In conversations that you had with me both yesterday and today, did you advise me that you forgot to

introduce it?

A In that form, no. I told you, and I used that word "undoubtedly" in connection with extended conversations about why it didn't get in. That I did do.

Q Thank you. And did you also acknowledge in conversations with me, Mr. Barber, that if you had an opportunity to re-try this case, you would indeed attempt to introduce the Subscription Agreement through Virl Thornton? Did you tell me that just yesterday?

A What I told you was is that when Ron reminded me that I hadn't done it, I attempted to do it. And if I had it to do again, I would probably put it in.

MR. BUGDEN: Thank you. That is all I have.

THE COURT: Thank you. You may cross.

MR. BUGDEN: Actually, let me just ask several other questions.

Q (By Mr. Bugden) Mr. Barber, between the time that you were retained by Mr. Harry and the time that this case went to trial, did you have problems with or did you -- Did you have a heart attack, let's start there?

A Yes.

Q And is it true that --

THE COURT: Well, between the time you were retained and started to work on this case at the time it

was tried?

THE WITNESS: That is my recollection of it, yeah. When was it tried? October?

MR. SONNENREICH: December.

THE WITNESS: December, oh, that's right. I think that I was retained early in the summer. Yes, the heart attack did come in that interim.

Q (By Mr. Bugden) Is it also true, Mr. Barber, that you suffer from a diabetic condition?

A That is correct.

Q And is it also true, sir, that in the last six months you have been involved in an automobile accident where your diabetic condition contributed to the accident?

A Within the last six months, yes.

Q And what are some of the symptoms associated with your illness or with the diabetic condition?

A Mobile unconsciousness.

Q Would it be fair to say you are more forgetful now than you were prior to the onset of your illness, sir?

A I have no way of knowing because I have had it since I was 11.

MR. BUGDEN: That is all I have.

CROSS EXAMINATION

BY MR. SONNENREICH:

Q Mr. Barber, in your opinion what was the situation in this case at the time that the prosecution rested?

A Well, specifically vis-a-vis what?

Q Okay. First of all, what was your opinion with respect to the length of the trial at that time?

A It was dragging unmercifully.

Q And did you have an opinion as to the effect of that upon the jury?

A Yes.

Q What was your opinion?

A Though I did not have the sense that the jury was angry that it was dragging, I thought the jury might be prone to reward those who would get on with it.

Q Did you have an opinion at that time as to whether you had been able to communicate the theory of your case to the jury through cross examination?

A Yes.

Q What was your opinion at that time?

A I believe that the jury understood the issues.

Q How many witnesses did you intend to call?

A Mr. Harry and I had discussed the witnesses and I think we'd decided that three or four representing

persons that had been subjected to the bamboozling blandishments of the offerer of the securities and then individuals in his own association of brokers who had sold them would comprise our witness list, as well as myself.

Q But, in fact, you only called the two brokers and Mr. Harry, correct?

A That is correct. Same guy.

Q Yeah, okay, I understand what you are saying. Did you give a closing argument in the case?

A Yes, I did.

Q Did the fact that you only had a few witnesses, and then expected to give a closing argument, how did that relate to your not giving an opening statement?

MR. BUGDEN: Your Honor, that is --

THE WITNESS: I doubt that it did.

THE COURT: Yes, Mr. Bugden?

MR. BUGDEN: Well, I think that the question requires the witness after the fact to quarterback and reinterpret what he did, when he has now acknowledged, for example, with regard to opening statement, that he forgot to give it.

THE COURT: I don't know that he really acknowledged that. By the same token, Mr. Bugden, the questions you asked him about, would he now introduce in

evidence the Subscription Agreement, is the same nature of question, looking back at it, has he got a view. And in this case, I think what is sauce for the goose is sauce for the gander. I will allow it.

Q (By Mr. Sonnenreich) Let's discuss this Subscription Booklet that we didn't get in through Virl Thornton and attempted to get in through Ron Harry.

A Actually, tried to get it in through you, Mr. Sonnenreich, but I knew it wouldn't come in through Mr. Harry and I needed your stipulation to get it in and you wouldn't give it to me. That is actually what happened.

Q That is when Mr. Thornton had gone to Arizona, for the record.

A That is correct. That is right.

Q Did you cross examine Mr. Thornton during the trial?

A I did.

Q And did you cross examine him with respect to issues that were the same basically as the issues raised by that Limited Partnership Subscription Booklet?

A Well, they were issues related to it. I don't believe I talked to him about most of the same issues, no.

Q Did you feel that your cross examination of Mr. Thornton was adequate?

A It was insufficient to get Mr. Thornton to say what I wanted him to say, but I am afraid I had exhausted my ability to get him to say it.

Q Fair answer.

MR. BUGDEN: I wonder if we could just have Mr. Sonnenreich ask questions and not editorialize. I will object.

THE COURT: Yeah, limit your comments, counsel.

Q (By Mr. Sonnenreich) Now, did you receive a list of documents? (Off the record discussion between Mr. Sonnenreich and Mr. Bugden.)

MR. BUGDEN: Ask him about the three sets of points and I will know what you are talking about.

MR. SONNENREICH: Okay.

Q (By Mr. Sonnenreich) In your earlier affidavit there were three sets of talking points or whatever about Mr. Isaacs, Mr. Thornton and Mr. Brgoch. They were attached as Appendix 3, 4 and 5 to the Memorandum in Support of the Motion for New Trial or in the alternative, a Motion in Arrest of Judgment.

MR. BUGDEN: Actually, let me interrupt you. That is not accurate. In the affidavit, two documents were attached: the Suitability Questionnaire and the Subscription Booklet. That is from the -- the third document was not discussed.

MR. SONNENREICH: The Pre-Offering Summary?

MR. BUGDEN: That is not one of the documents.

MR. SONNENREICH: The points, not the Pre-Offering Summary. The points, the talking points. These, is what I am talking about.

MR. BUGDEN: Okay, I didn't understand what you are talking about. You mean the outlines, three of them, bearing the name of Ike Isaacs or Frank Brgoch or Virl Thornton, that is your question?

MR. SONNENREICH: That is correct.

THE COURT: May the Court see what you are referring to?

MR. SONNENREICH: Let me check and see what we introduced them as. (Pause) They were in fact introduced, Your Honor.

Q (By Mr. Sonnenreich) I give you Defendant's Exhibits 1, 3 and 5. Did you see those exhibits prior to trial?

A I believe that I -- you have given me 6 and 7, as well.

Q Okay, well, put those aside.

A But 6 is the list of limited partnerships on Thornton.

Q Okay.

A Yes, I received all of those prior to the trial

from Mr. Harry, whom I believe prepared them.

Q Each of these exhibits, there is a list of suitability questions or issues or points, however you want to phrase them, one for Mr. Isaacs, one for Mr. Brgoch, and one for Mr. Thornton. Did you address suitability in your cross examination of the witnesses?

A Yes. Well, using it in the plural, to my recollection I addressed the issue of suitability with considerable detail with Mr. Thornton. And perhaps somewhat less detail with the other two.

Q There are also lists of limited partnership portfolios for each individual. You did not go in detail on each one of those limited partnerships with each individual, did you?

A No, I did not.

Q Why was that?

A Well, a number of reasons. One is that most of them are not real estate limited partnerships, and I doubted that but for a reference to them they are very likely admissible. But secondly, I was familiar with the direct testimony of each of these investors, at least Brgoch and Isaacs, that the two of them claimed to have expressly instructed Mr. Harry not to put them in any more of those kind of deals before the Red River Limited Partnership was presented to them. And I knew that both

Mr. Brgoch and Mr. Isaacs were pretty much there to make a speech and that every time I raised the issue, they made their speech. And so I thought it was going to be damaging to go through the detail of those and that the return on that issue would not be very great.

Q Final question, did your health interfere with your ability to participate in the trial?

A Well, that is always a difficult decision and I will concede that I don't know that I had the same energy level then that I would have the prior year. But I felt that I did not feel the stated condition of my health to have imposed substantial inability to try the case.

Q One last little minor matter. You mentioned that you told Mr. Bugden that you quote "forgot" to make an opening statement perhaps in the last couple of days. Can you elaborate why you used the word "forgot"?

A Well, I think I did tell Wally, as part of a longer statement about the issue, that I forgot to make the statement. But what I intended to imply by that, counsel, was that at the time that I didn't stand up and commence to make an opening statement, I didn't engage in an act of mental process about the issue of making a statement at all. And in talking to Wally about it, I thought I have expressed what happened, you know, five or six different ways. And I have tried each time to convey

the same thing to him, and to you. And that is, that I did not engage in any mental process that I can now recall about whether to make an opening statement or not at the beginning of our case at the time that decision was made. But I disagreed with Wally that when I spoke with him this afternoon that the term "forgot" covered all the issues that were fair to be presented in that respect because even though I didn't think about it at the time and therefore in that sense forgot. I don't think that, as he implied earlier, I had made a decision to make such a statement and then forgot that I had made the decision to do it. I think that the other factors had to do with the fact that I did not engage in the processes to make a conscious decision at that time and the extent to which they may have influenced that decision or my forgetting to have made the statement, if you will, I am not exactly certain of. I think that is a fair statement of the whole issue.

Q Is what you are saying then that these circumstances that existed, the ones that we discussed about the length of trial, et cetera, may have been responsible for not making a conscious decision to make an opening statement.

MR. BUGDEN: That requires absolute speculation. He is saying, "I don't remember that I made

a reflective decision." Now he is asking him to speculate. I will object to the form of the question.

THE COURT: Would you read the question back.

(Reporter read back the last question.)

MR. BUGDEN: "May have been responsible."

THE COURT: I think that is further application of his prior explanation. I will allow it. Go ahead.

THE WITNESS: Those factors may have influenced the fact that I forgot, let's put it that way. I didn't think it was very important to remember. If that is the opposite of forgot, that is what I intended to tell both you and Mr. Bugden.

Q (By Mr. Sonnenreich) In light of the circumstances of the trial at this time, it did not appear important to you then to sit down and really analyze the question; is that what you are saying?

MR. BUGDEN: I will object to that. I will object to the form of the question, Your Honor.

THE COURT: Why?

MR. BUGDEN: He is, I think, completely mischaracterizing what Mr. Barber has said before. Again, he is asking him to second guess it, to quarterback it now after the fact. When what he is saying is, "I didn't go through a reflective process."

MR. SONNENREICH: And I am asking why.

MR. BUGDEN: I had no conscious --

THE COURT: Mr. Bugden, I think you are trying to hear what you want to hear. That isn't exactly what he is saying, not the way I hear it. Did you understand the last question he just asked you, Mr. Barber?

THE WITNESS: Yeah.

THE COURT: Well, I think I did too. Can you answer it?

THE WITNESS: No, I have got to hear it again now.

THE COURT: Read the last question, Dorothy.

(Last question read back by the reporter.)

THE WITNESS: Well, I don't think I am saying that either. What I am saying is that I was satisfied to proceed without making the opening statement and whatever circumstances were then extinct that led me to be satisfied, appeared to have discouraged from the fact that I forgot to put the statement in, to spend any more time thinking about it or analyzing that prospect. I can't express it any more clearly than that.

THE COURT: I understand. That is all right.

MR. SONNENREICH: Thank you. Nothing further.

THE COURT: Mr. Bugden.

REDIRECT EXAMINATION

BY MR. BUGDEN:

Q Mr. Barber, you did not make a strategic decision to forego giving an opening statement. There was no analysis where you said strategically "I am not going to make an opening statement"? That didn't happen, did it?

MR. SONNENREICH: Your Honor, if that calls for a legal conclusion as to what he says constitutes a, quote, "strategic decision" within the meaning of the case law, I object. That is for the Court to decide.

THE COURT: Well, it is. It is and while I have some problems with the question and Mr. Bugden knows what those problems are, I am going to allow you to answer it.

Q (By Mr. Bugden) You didn't go through a thought process, a cognitive process at all with regard to the opening statement?

A That is correct.

Q I will start there. And because you didn't go through a cognitive process, you didn't go through a strategic decision-making process either, did you?

A I don't know what the difference is.

Q I am not sure I do either, but I am interested. You didn't make a strategic decision to not give an

opening statement?

A I did not sit down and think, once again, about whether I should make an opening statement.

Q And what I understand you to have said now in response to the State's attorney is that you reserved the opening statement but had not decided whether you would give one.

A I just reserved it. I didn't do any prior consideration of whether I was going to give one again.

Q And when you didn't give one, there was no consideration. You forgot to give one at that time, right?

MR. SONNENREICH: Well, I'm sorry. He has expressed what he meant by "forgot."

THE COURT: Well, I understand that. If you can answer, let him.

Q (By Mr. Bugden) You forgot to give one, isn't that right, Jimmy?

A In the sense that in light of all of those other circumstances that I have given you about eight times, I did not think about the process of not giving the statement. I am not going to say it is forgetting, though, because I think it implies more than I mean to say, and that is, that there was a reason to remember. You understand what I am saying?

Q There was no thinking with regard to giving the opening. It just didn't happen.

A It was a decision or non-decision that was made given the applicable circumstances.

Q And are you suggesting today, Mr. Barber, that just somehow subconsciously these other things you have told Mr. Sonnenreich about, that is, that the trial was running on, that you thought that the jurors were bored, that you thought you were losing the jury, you think that just subconsciously helped you make the decision?

A Of course.

Q Oh, I see.

A That is how you make decisions in trial.

Q But you didn't make this decision, did you?

MR. SONNENREICH: Argumentative, Your Honor.

Q (By Mr. Bugden) You made no decision about an opening statement, isn't that your testimony?

A Is that a question?

Q Yes, sir.

THE COURT: No. I will allow it.

THE WITNESS: Yeah, I didn't make a conscious decision about it.

MR. BUGDEN: Thank you. That is all I have, Judge.

MR. SONNENREICH: Just very quickly, Your

Honor.

RECROSS EXAMINATION

BY MR. SONNENREICH:

Q Mr. Barber, how long have you been a trial attorney?

A About 20 years.

MR. BUGDEN: This is beyond the scope.

MR. SONNENREICH: No, he got into the question of whether he does it consciously or subconsciously, Your Honor.

THE COURT: All right.

Q (By Mr. Sonnenreich) Mr. Barber, how many cases have you tried, approximately?

A Oh, I have no idea. Apparently not as many as Mr. Brass.

Q More than a few cases?

A Yeah, more than a few.

Q Tried maybe more than a few cases a year?

A Not anymore.

Q Not anymore, just a few a year?

A Uh-huh.

Q Is it safe to say you have tried at least a hundred cases?

A I would say so.

Q Do you always make every single decision in a

case as a matter of conscious thought?

A No.

Q Do you make many decisions just subconsciously as a matter of reflex?

A If you want to call that making a decision, yes. What you do is act on the basis of the circumstances as you then perceive them.

MR. SONNENREICH: Thank you, no further questions.

MR. BUGDEN: I have nothing else.

THE COURT: May this witness be excused?

(No objection from counsel.)

THE COURT: Mr. Barber, you may step down. You may be excused.

All right now, I think, Mr. Bugden, I understand. I am not saying you can't argue. That isn't the point. I am trying to tell you where I am.

MR. BUGDEN: Yes, sir.

THE COURT: I think I understand what your position is in regard to the -- that is, as far as the evidence is concerned.

MR. BUGDEN: Yes, sir.

THE COURT: In regards to the issue of Mr. Barber not making an opening statement.

MR. BUGDEN: Thank you.

THE COURT: And I think I understand the testimony as it has come in on your issue as to the failure to introduce the Subscription Agreement.

MR. BUGDEN: Yes.

THE COURT: And your position is that that is all the evidence that we need and you are prepared now -- I am not trying to put words in your mouth -- but you are now prepared, we can go forward with the rest of this, for lack of a better way of phrasing it with my inadequacies, a normal procedure to argue the motion.

MR. BUGDEN: I am ready. I have the spurs on my side. I am ready to roll.

THE COURT: The spurs aren't in your side. I am in pain. All right now, Mr. Sonnenreich, are you satisfied at this point that I now have before me the evidence, if we want to call this evidence or whatever, all of the extrinsic materials I need now to make a decision on this case?

MR. SONNENREICH: Your Honor, with the possible question of one thing, and that is that we have the preliminary hearing transcript in front of you. It is important that I can reference that transcript and reference the references in it to quote Exhibit D-1.

Now, I can put on witnesses who can tell you exactly what D-1 is. The transcript describes it

somewhat in its description of exhibits. It calls it a "Questionnaire Subscription Booklet." I can tell you what it was, but I do need to know that that issue has been resolved so you know what the transcript is talking about because our argument, of course, to give you the one-second version, is that Virl Thornton had already testified that he didn't see the pages in the Subscription Agreement that are the key pages. That is our reading of that transcript.

THE COURT: Well, Mr. Bugden, I don't want in any way to impinge upon the procedural oars, substantive prerogatives of you as counsel for your client. On the other hand, it seems to me that what we are talking about insofar as this document, the saying is that the document we are talking about is really pretty much a housekeeping matter.

MR. BUGDEN: I would agree. I totally agree.

THE COURT: If you feel aggrieved with Mr. Sonnenreich by being able to -- Well, if you are not willing to accept his statement as a person who was present at the time of the preliminary hearing in this matter, that that is what those records refer to, that is the document that those references refer to, then I would suggest we can go ahead today and hear argument for a somewhat limited period, and you can supplement the

identification of what that reference refers to by an affidavit of an independent party present at the trial who knows exactly what that is. I don't know who that is, but it has got to be a bunch of other people who were around at the time of the preliminary hearing. I said "trial." I didn't mean that. I meant the preliminary hearing.

MR. SONNENREICH: Max Wheeler, for example, could identify the documents since he produced them.

THE COURT: All right, whatever. And yet we could -- And if you want to do that, we can listen to argument for a period of time today. And then if there is still a dispute about what that reference refers to, we can have that affidavit produced. If you are then not satisfied, I will make a ruling one way or the other.

MR. BUGDEN: We can work it out. I am sure we can work it out. I am not willing to take his representation to you today without some discussion about it with him, which we haven't had a chance to do yet; but I am prepared to present argument and proceed.

THE COURT: How much time do you need?

MR. BUGDEN: Well, I think I probably need at least half an hour to 40 minutes. Half an hour at a minimum.

THE COURT: I understand. I am not trying to

cut you short and, by the same token, I don't want to keep running you around the horn and bringing you back to here.

MR. BUGDEN: We could at least, I would think, address the Strickland vs. Washington today. The evidence is fresh in your mind. We can talk about the standard.

THE COURT: Can we do that in, say, 15 minutes on the side?

MR. BUGDEN: I am sure I can. I will be less than that.

THE COURT: All right then, what I want to do is this. . . (Court and counsel discussing a continuation date.)

Let me make another statement here. I am just gradually, God, believe it is gradually -- I don't know why it is, I can go out to Tooele and I get further and further behind here. Everybody else goes out to Tooele and they make time. I don't know how they do that, but I don't. I am just now catching up from my Tooele syndrome and I have not had the time to put into this file what I want to. I want to read both of these memos again. I went through them, but I have got to say that it was rather hurriedly.

MR. BUGDEN: I know that you will find that it

is enthralling reading.

THE COURT: I know I will. The trial was an enthralling trial. (Courtroom laughter.) The only thing I like about stocks is the fact they produce income, and mine don't. But I want to find some time when we can do this that will give you gentlemen enough time to be thoroughly satisfied that you have gotten over it in its entirety. And by the same token, I would like to be at that point thoroughly, word for word, conversant with your briefs which is going to take me probably four or five hours, three or four hours, to go through them and re-read and so on. I have the same kind of a problem the week following next week and the week following that. The judicial conference is being held the 21st through the 24th and I am taking three days of the following week. What about -- Why don't we set this for -- What about doing it on Friday, the 1st of May, at 2:00, and let's plan an hour to an hour and a half to the outside. Is that satisfactory, Mr. Sonnenreich?

MR. SONNENREICH: Yes, it is.

THE COURT: I will give you each a half hour right now on the --

MR. BUGDEN: Ineffective.

THE COURT: And then I will have that in mind when I read this thing this weekend, then you can come

back and give me a half hour each on the balance of your arguments.

(Court and counsel discussing continuation of further court dates.)

MR. BUGDEN: May 1 is great, if we could do it then at 2:00.

THE COURT: I'll do it at 2:00 if that is when you want to do it.

MR. SONNENREICH: That works for me.

THE COURT: We will do that. We can do the whole thing that day. I'll give you the whole rest of the day until 7:00.

MR. BUGDEN: Okay.

THE COURT: Is that satisfactory?

MR. BUGDEN: Great.

MR. SONNENREICH: Your Honor, in order to speed things up, obviously with me copying opposing counsel, I would like to send you some supplemental briefing material mainly in the form of -- indicating which pages of the preliminary hearing to look at with respect to these issues.

THE COURT: I have no objection to that, but I don't want anymore argument. I don't want anything new. If you want to give me something that will help me get to where you want me to go in the record, I will do that.

Now, I don't mind that, a carbon copy of Mr. Bugden. Mr. Bugden, if you have references that you wish to bring to the Court's attention, you may do the same thing. I don't want more argument. I don't want anything new, but if you want to give me some references, you may do so.

MR. SONNENREICH: I do have one significant after-discovery case which I just came upon the last day or two in Tenth Circuit, and I have a copy on that. Not with elaboration, but here is the case and one paragraph.

THE COURT: Yeah. All right now, if we are going to do that, let's do the whole thing on that date rather than today, Mr. Bugden, is that all right?

MR. BUGDEN: Sure.

THE COURT: Because what I will do is we will come on at 2:00. If you guys need three hours, we will go right down the trial. I hope we don't. In the meantime, I will get through the briefs in their entirety. Don't worry about me not remembering the evidence. It is clear in my mind where we are and what we are talking about.

MR. BUGDEN: Your Honor, may I verse the Court with -- I have underlined those. Do you have a copy that is not underlined?

MR. SONNENREICH: What is that?

MR. BUGDEN: The transcript of Mr. Harry when he was before you a month ago.

MR. SONNENREICH: My copy is not underlined but I have written in it. It has yellow outlining. Mine, if I photocopy, I don't think it will show. I think I do mind.

MR. BUGDEN: Could we submit that to you?

THE COURT: Sure.

MR. SONNENREICH: I can do that at the same time that I indicate the pages, which I will do by Monday or Tuesday, I believe.

MR. BUGDEN: Your Honor, I would appreciate it if you would rule, and I think it is appropriate at this time for you to rule that Mr. Barber's affidavit, the one that the State wants to introduce, will not be received cause he has testified.

MR. SONNENREICH: It was already withdrawn, Your Honor.

THE COURT: Yeah. It wasn't offered.

MR. BUGDEN: So you are clear when you sit down and look at this stuff, what I think you should have is a packet of exhibits that Kathy can -- she had it in a separate packet from the earlier hearing, the March hearing where my client testified. Then we will include an affidavit from Mr. Barber that was received.

THE COURT: That is in the file. Kathy, dig that stuff out.

THE CLERK: I had it and gave it to one of the attorneys earlier.

THE COURT: Now, are these the documents you talk about?

MR. BUGDEN: Yes, sir.

THE COURT: Give them to Kathy and she will put them all together. I will have my homework on this case done by Monday afternoon of this coming week.

MR. SONNENREICH: Your Honor, I believe that Mr. Barber has already waived his right to sentencing time and the timeframe for Mr. Harry. Could I get another waiver on the record?

MR. BUGDEN: He will waive that. We want you to have a chance to look at the briefs.

You have the right to be sentenced in a speedy fashion. Actually, the statute talks about between 2 and 30 days after a jury verdict or a finding of guilt. Are you willing to waive your statutory right?

MR. HARRY: Yes.

THE COURT: You are?

MR. HARRY: Yes.

THE COURT: Okay. Now, if either counsel feel aggrieved about the Court's handling of this matter with

Mr. Brass's testimony or anything else, if you want to bring it to my attention by motion, you can do so. I didn't in any way mean to dis-accommodate anybody, nor to cut you off from any of your rights. I wanted to fully advise of the premises. So if there is something you think we haven't done that we ought to, or in any way where somebody's rights have been trampled upon, please let me know. I am trying to avoid those problems exactly. Is there anything further then?

MR. BUGDEN: Nothing further from the defendant.

MR. SONNENREICH: Nothing further, Your Honor.

THE COURT: Well, that will be the procedure we will follow. If there is nothing to come before the Court this afternoon, we will be in recess.

MR. BUGDEN: Thank you.

MR. SONNENREICH: Thank you.

* * * * *

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, DOROTHY L. TRIPP, C.S.R., do hereby certify:

That I am one of the Official Court Reporters of the Third District Court of the State of Utah.

That on Friday, April 10, 1992, I reported the testimony and proceedings, to the best of my ability on said date in the above-entitled matter, presided over by the Honorable Richard H. Moffat in the Third District Court of Salt Lake County, State of Utah: and that the foregoing pages, numbered from 1 to 66, inclusive, contain a full, true and correct account of said proceedings of motion hearing to the best of my understanding, skill and ability on said date.

Dated at Salt Lake City, Utah, this 27th day of April, 1992.

Dorothy L. Tripp

Dorothy L. Tripp, C.S.R.
Official Court Reporter
License No. 00074-1801-8

ADDENDUM D

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

	:	MINUTE ENTRY
STATE OF UTAH	:	
PLAINTIFF	:	CASE NUMBER 901901580 FS
	:	DATE 04/10/92
VS	:	HONORABLE RICHARD H MOFFAT
	:	COURT REPORTER OROTHY TRIPP
HARRY, RONALD ALAN	:	COURT CLERK KBG
DEFENDANT	:	

TYPE OF HEARING: HEARING
PRESENT: DEFENDANT

P. ATTY. SONNEREICH, DAVID
D. ATTY. BUGDEN, WALTER F.

THIS CASE COMES NOW BEFORE THE COURT FOR A FURTHER HEARING ON THE DEFENDANT'S MOTION FOR ARRESET OF JUDGMENT, OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL.

ED BRASS IS SWORN AND EXAMINED IN BEHALF OF THE DEFENDANT. BASED UPON DISCUSSIONS, FURTHER HEARING OF THIS MOTION IS CONTINUED TO MAY 1, 1992 AT 2:00 PM.

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	MINUTE ENTRY
Plaintiff,	:	Case No. 901901580 FS
vs.	:	JUDGE RICHARD H. MOFFAT
RONALD ALAN HARRY,	:	
Defendant.	:	

The Court having considered the Motion for New Trial or in the Alternative, Motion in Arrest of Judgment, all of the pleadings on file in regard thereto and having heard oral argument in two separate hearings and now being fully advised in the premises makes this its:

MINUTE ENTRY

The Motion for New Trial and the Motion in Arrest of Judgment are both denied. The Court is of the opinion that the six points raised by the defendant are without merit. Point one is that the Court should not have allowed the State's expert witness to express an opinion as to what constitutes materialality in a securities fraud case. The brief answer as

to all of the issues raised by the defendant is that they have been met and the Court's opinion is based upon, inter alia, the arguments contained within the State's Memorandum in Opposition to the Motion for New Trial or Arrest of Judgment.

However, specifically the first argument is met by the recent Utah case State v. Larsen, found at 180 Utah Advance Reporter 13 decided February 7, 1992. This issue was specifically decided in favor of allowing the expert testimony and in fact the expert involved in that case immediately preceded the expert in this case as the Director of Registration for the Securities Division of the State of Utah.

Point two is also answered by the Larson case in that the distinction between "willfulness" and "specific intent to defraud" was discussed and the case held that willfulness was the proper standard under the Utah Securities Act. The defendant's point three claims that good faith is a complete defense to prosecution under Utah Code Annotated Section 61-1-1 (1), (2), (3) and 61-1-2-1. Again because of the holding in Larson a complete discussion of which will found in the State's Reply Memorandum, the Court is of the opinion that under the circumstances herein the instruction given was completely adequate.

Point four is a claim by the defendant that his trial counsel was ineffective in assisting him. This claim raises a

great deal of concern on the part of the Court because it has become fashionable as a defense tactic to throw the original trial counsel in criminal cases to the wolves on the platter of ineffective assistance of Counsel giving little or no credence to the circumstances of the trial. The trial court supervised the proceedings in this case and is of the opinion that there was no ineffective assistance of counsel. The Court does not believe that trial counsel's performance fell below an objection standard of reasonableness. The Court certainly does not feel that the failure to make an opening statement in any way reduces effectiveness of counsel. That is often done and in the facts before the Court in this case is impossible to determine that failure to make an opening statement would have altered the outcome of this case in any way whatsoever. The question of introduction of the subscription booklet to the Red River Mountain Project appears to the Court to be much more a tactical decision than it does to be ineffective assistance of counsel. There is certainly no evidence here that would tend to show that introducing the booklet would have altered the outcome of this case. As a matter of fact there was no way of knowing what the testimony might have been by Mr. Thornton if the document had not been used but there is some substantial reason to believe that his testimony could have been damaging to the defense.

As to points five and six the Court is of the opinion that

Count 4 and Counts 2 and 3 were properly pled and the Court so ruled on motion during trial. As a matter fact as is noted in the opposition memorandum Judge Fuchs at a preliminary hearing on this matter ruled that Counts 2 and 3 were sufficiently pled and there has been no new argument or evidence in support of the defendant's position raised at any time.

Counsel for the State will prepare an appropriate order.

DATED this 12th day of May, 1992.

RICHARD H. MOFFAT
DISTRICT COURT JUDGE

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE

000487

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, postage prepaid, to the following, this 22 day of May, 1992:

David N. Sonnenreich
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